Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

JOHN R. McCARRON,

Petitioner,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of MERITOR SAVINGS BANK and in its own capacity,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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168 pp

QUESTIONS PRESENTED

Whether the amount due under a severance pay contract is "actual direct compensatory damages" for which the receiver of a Federal depository institution is liable under 12 U.S.C. § 1821(e).

Whether the receiver of a Federal depository institution is liable for damages when it revoked its prior approval and repudiated a contract between a "white knight" and the institution based on a regulation enacted post-receivership.

Whether receivership funds should be distributed to the depository institution's shareholders without payment to a general creditor under a severance contract.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit which forms the basis for this petition is published at 111 F.3d 1089 (1997). A copy of the opinion is reprinted in Appendix A hereto. ("App. A") at 1a.

STATEMENT OF JURISDICTION

(i) The judgment requested to be reviewed was entered by the United States Court of Appeals for the Third Circuit on May 1, 1997. App. A at 1a.

(ii) An order denying a timely petition for rehearing and suggestion of rehearing en banc was issued on July 8, 1997 which was within 90 days of when this petition was filed in accordance with Supreme Court Rule 13.1. App. D at 35a.

(iii) Rule 12.5 does not apply since this is not a cross-petition.

(iv) Jurisdiction in this court to review the judgment and decision by the Court of Appeals for the Third Circuit is conferred on this Court by 28 U.S.C. § 1254.

(v) The notification required by Rule 29.4(b) or (c) is inapplicable. Service was accomplished in accordance with Rule 29.4(a).

STATUTES AND REGULATIONS INVOLVED

Financial Institutions Reform, Recovery and Relief Act of 1989, 12 U.S.C. §§ 1821(d) and (e) reprinted in the appendix. App. E at 37a.

Regulations and Statements of General Policy Part 359 — Golden Parachute and Indemnification Payments reprinted in the appendix. App. F at 92a and App. G at 128a.

STATEMENT OF THE CASE

A. Circumstances and Procedural History of ~~Action~~.

This action involves the liability of a receiver of a financial institution to pay damages from the estate of the institution for repudiation of a severance pay agreement as actual direct compensatory damages pursuant to 12 U.S.C. § 1821. Petitioner, John R. McCarron, is a former executive of Meritor Savings Bank which is a Federal depository institution now in receivership. McCarron was induced by a severance pay agreement[1] to leave his successful law firm practice during 1988 to join Meritor and apply his talent to reverse the slide of the troubled institution toward economic failure.

The Meritor executive management team, of which McCarron was the Executive Vice President and General Counsel, was formed with the supervision of the Federal Deposit Insurance Corporation ("FDIC") under a Memorandum of Understanding. Meritor's executive management team was favorably regarded by FDIC. McCarron contended FDIC approved the severance agreement and, although FDIC did not agree it approved the agreement, FDIC stipulated for this case that FDIC did not contend its approval of the agreement was required for the contract to form the basis for a claim. Meritor went into receivership in spite of the effort by McCarron and other members of Meritor executive management to save the institution.[2] FDIC agrees McCarron was not responsible for the alleged demise of Meritor.

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1. Severance pay was guaranteed by the Severance Compensation Agreement which covered only McCarron.

2. There is presently pending an action by shareholders against the United States based on breach of contract in connection with the seizure of Meritor. The litigation is among the lawsuits which depended on this Court's decision in *United States v. Winstar*, 116 S. Ct. 2432 (1996).

FDIC was appointed receiver of Meritor during 1992. McCarron's severance pay agreement was in effect as of the appointment of the receiver. Without explanation, FDIC did not honor McCarron's agreement. McCarron timely filed a proof of claim with FDIC for payment under the severance contract. FDIC did not pay McCarron's claim.

McCarron commenced this action in the United States District Court for the Eastern District of Pennsylvania for breach of contract/specific performance to recover the amount due under the severance agreement. The matter was submitted to the district court on stipulated facts. App. C at 27a. Summary judgment was entered by the district court in favor of FDIC and against plaintiff. App. B at 20a. The district court's decision was based on *Hennessy v. FDIC*, 58 F.3d 908 (3d Cir. 1995), *reh. denied*, 66 F.3d 659, *cert. denied*, 116 S. Ct. 1318 (1996), in which the Third Circuit decided severance pay benefits are not actual direct compensatory damages recoverable under 12 U.S.C. § 1821(e)(3)(A) for contracts repudiated by the receiver. McCarron timely appealed to the United States Court of Appeals for the Third Circuit.

The Third Circuit affirmed. The decision to affirm the district court judgment concerning the absence of recoverable damages was based on *Hennessy*. *McCarron v. FDIC*, 111 F.3d 1089, 1095 (3d Cir. 1997). The Third Circuit agreed McCarron was a "white Knight", but the golden parachute regulation then in effect allowed the receiver to revoke its pre-approval of the agreement. *McCarron* at 1097.

McCarron remains a general creditor of Meritor under the severance contract in spite of repudiation of the severance contract. The receivership estate has a surplus. There are sufficient funds to pay McCarron without invading the deposit insurance fund and still distribute funds to Meritor's

shareholders. Although raised and briefed, neither the district court nor the court of appeals addressed McCarron's contention that a person whose contract is repudiated remains a general creditor of the institution entitled to payment before distribution to the institution's shareholders under 12 U.S.C. § 1821(d)(11).

B. Basis for Federal Jurisdiction in the Court of First Instance.

This action is based on the Financial Institutions Reform, Recovery and Relief Act of 1989 ("FIRREA"). The jurisdiction of the district court was predicated on 28 U.S.C. § 1331 because it involved a federal question. The jurisdiction of the court of appeals was pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

I.

THE THIRD CIRCUIT'S OPINION CONFLICTS WITH THE OPINIONS OF OTHER CIRCUIT COURTS ON AN IMPORTANT ISSUE OF FEDERAL LAW.

This matter involves an important issue of federal law on which the circuit courts are sharply divided. The decision of the Third Circuit in this matter conflicts with decisions of other circuit courts on the same important issue. Numerous circuit courts are divided on the issue with the Third and First Circuits on one side and the Federal, Ninth, and Eleventh Circuits on the other side. The interpretation of a federal statute is the focus of the disagreement. Accordingly, it is appropriate to grant the writ to resolve the conflict.

The Third Circuit decision in this matter was the latest in a series of circuit court decisions involving five circuit courts which addressed the liability of a receiver under FIRREA for

damages due to repudiation of severance agreements with Federal depository institutions. So far, litigation over the issue has led to six published circuit court opinions. The issue addressed by the circuit courts in each of the opinions is the same: whether the damages caused by repudiation of a severance contract are "actual direct compensatory damages" for which the receiver is liable under 12 U.S.C. § 1821(e)(3)(A), or are the damages "lost profits or opportunity" for which the receiver is not liable under 12 U.S.C. § 1821(e)(3)(B). On this issue, the Federal, Ninth, and Eleventh circuit courts held that damages due to repudiation of a severance contract are actual direct compensatory damages recoverable against the receiver, while the First and Third circuit courts held that damages due to repudiation of a severance contract was a form of lost profits or opportunity which are not recoverable against the receiver.

The decisions reflect a continuous volley among the circuit courts over the issue since 1993. The initial circuit court opinion to decide whether severance pay was a valid obligation of the receiver was *Howell v. FDIC*, 986 F.2d 569 (1st Cir. 1993), decided by the First Circuit. *Howell* held that a contract for severance pay was not a valid obligation of the receiver since the damages were a form of lost profit or lost opportunity. *Howell* at 573. The Federal Circuit then addressed the same issue in *Office and Professional Employees International Union v. FDIC*, 27 F.3d 598, 600 (D.C. Cir. 1994) ("*OPEIU*"). *OPEIU* specifically rejected the reasoning and holding of *Howell*, and found severance pay was actual direct compensatory damages for which the receiver was liable. *OPEIU* at 604. *Howell* and *OPEIU* drew the line of conflict.

With the split in the circuit courts set, other circuits joined sides on the issue. The Third Circuit in *Hennessy v. FDIC*, 58 F.3d 908 (3d Cir. 1995), *reh. denied*, 66 F.3d 659, *cert. denied*,

116 S. Ct. 1318 (1996)[3], rejected *OPEIU* and aligned with the First Circuit's *Howell* decision. *Hennessy* at 921. Since *Hennessy*, but before the Third Circuit decided this matter, the Ninth Circuit in *Monrad v. FDIC*, 62 F.3d 1169 (9th Cir. 1995), and then the Eleventh Circuit in *McMillian v. FDIC*, 81 F.3d 1041 (11th Cir. 1996), sided with *OPEIU* and rejected *Howell* and *Hennessy* on the issue. *Monrad* at 1174; *McMillian* at 1054. The decisions since *Howell* acknowledged the split in the circuit courts on the issue and chose a side. *OPEIU* at 603; *Hennessy* at 920-21; *Monrad* at 1173-74; *McMillian* at 1174. The Third Circuit's opinion in this matter, *McCarron v. FDIC*, 111 F.3d 1089 (3d Cir. 1997), is the most recent published circuit court decision on the issue. *McCarron* sided with *Howell* and *Hennessy*. *McCarron* at 1095.[4]

This matter presents a compelling basis to grant the writ. The issue involves the interpretation of a significant federal statute applicable to every federally insured depository institution. The law affects the employment relationship between financial institutions and their employees, and leaves uncertain whether a promise to pay severance extended to recruit a capable executive to shore up the management of an institution will be a worthwhile inducement. The conflict in the decisions arose because of differences in analysis and opinion rather than

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3. There existed independent grounds for the decision to deny the claims in *Hennessy* since the Third Circuit decided the triggering event for payment of severance under an employee benefit plan not supported by a contract never arose. The Third Circuit decided the FIRREA issues even though it indicated the claims could not survive for independent reasons.

4. The definition of "actual direct compensatory damages" has been drawn into question in instances other than severance, although the factual situations have not been repeated sufficient to demonstrate an actual conflict among the circuit courts. *See Nashville Lodging Co. v. RTC*, 59 F.3d 236, 245 (D.C. Cir. 1995).

different circumstances or factors unique to locality. The disparity in the decisions promotes forum shopping and frustrates predictability of the law on which citizens and businesses depend to conduct their affairs. The conflict leads to the anomalous result in which the receiver is liable for severance in some circuits, whereas the same receiver is not liable for severance in other circuits. Uniformity on the issue is important.

The conflict will not resolve in the absence of a decision by this Court. It is not the situation that the issue was originally decided one way, but then changed over time after further reflection and debate, and seems headed for resolution. Instead, each of the circuit courts is committed to its view on the issue and will not accept or be persuaded by the view expressed by the opposing circuit courts. Resolution of the conflict depends on a decision by this Court.

II.

THE DECISION BY THE THIRD CIRCUIT NOT TO IMPOSE LIABILITY ON FDIC WHEN IT REVOKED ITS PRIOR APPROVAL OF THE SEVERANCE PAY AGREEMENT BASED ON A REGULATION ENACTED POST-RECEIVERSHIP CONFLICTS WITH THIS COURT'S DECISION IN *WINSTAR*.

In *United States v. Winstar*, __ U.S. __, 116 S. Ct. 2432 (1996), this Court confirmed the government is liable for breach of contract even though caused by a change in the law. *Winstar* is an important decision. The Court of Appeals for the Third Circuit decided a question of law contrary to *Winstar*.

Congress provided FDIC with the authority to prohibit, limit, or eliminate golden parachute payments when it enacted Section 2523 of the Comprehensive Thrift and Bank Fraud

Prosecution and Taxpayer Recovery Act of 1990. 12 U.S.C. § 1828(k)(1). FDIC issued a proposed regulation concerning golden parachute agreements prior to the Meritor receivership. 56 FR 50, 529; App. F at 92a. There was no regulation concerning golden parachute agreements in effect when McCarron's severance contract was formed and when the regulation was proposed. A "golden parachute payment" is:

> any payment (or agreement to make any payment) in the nature of compensation by any insured depository institution . . . that i) is contingent on the termination of such party's affiliation with the institution or holding company; and ii) is received on or after the date on which the insured depository institution is insolvent. . . .

12 U.S.C. § 1821(k)(4); 12 C.F.R.1(G); App. F at 115a-116a. The proposed regulation prohibited golden parachute payments, but included a "white knight" exception. 56 FR 50, 529, 12 C.F.R. Part 359.4; App. F at 124a-125a.

The "white knight" exception permitted golden parachute payments in those instances in which the agreement to make the payment was necessary to attract highly qualified individuals to a financially troubled institution to "reverse its slide toward economic failure." App. F at 120a. FDIC explained the application of the golden parachute regulation and the white knight exception:

> The purpose of this exception is to permit a troubled institution or depository institution holding company to attempt to reverse its slide toward economic failure by attracting competent new management which enjoys

> the confidence of that institution's primary federal regulator and the FDIC. However, FDIC is aware that individuals who possess the experience and expertise which qualify them for such a position are highly sought after business persons who, in most circumstances, already have established careers. . . . In order to induce such an individual to leave an established, stable career for a job in a troubled institution which may not survive regardless of that individual's efforts, it is generally necessary to agree to pay that individual some sort of severance payment in the event that the efforts of the individual for the institution are not successful. It is FDIC's view that, as long as the individual is not guilty of improper conduct while in the troubled institution's employ, such agreements reflect good business judgment, recognize the realities of the marketplace and may benefit both the institution and the deposit insurance funds.

56 FR 50, 529-01 (discussion) (App. F at 120a). The golden parachute payment was payable to a "white knight" under circumstances involving a receiver. The regulation enacted during 1995, after Meritor went into receivership, reserved to the receiver the right to repudiate any golden parachute contract even if for white knights and even if pre-approved. 12 C.F.R. § 359.4; App. G at 145a-146a.

McCarron was a white knight whose severance contract was a golden parachute agreement approved by FDIC. The Third Circuit upheld the right of the receiver to revoke its prior approval of the agreement which FDIC granted to itself in the

regulation enacted during 1995, but did not hold FDIC liable for damages as required by *Winstar*. The Third Circuit's decision not to impose liability on FDIC for breach of contract through the enactment of the regulation is in conflict with this Court's important decision in *Winstar*. The writ should issue to review the propriety of the application of *Winstar*.

III.

WHETHER THE RECEIVER CAN DISTRIBUTE FUNDS TO THE DEPOSITORY INSTITUTION'S SHAREHOLDERS WITHOUT PAYMENT TO A GENERAL CREDITOR UNDER A SEVERANCE CONTRACT IS AN IMPORTANT ISSUE OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

This matter involves an important question of federal law which has not been decided by this Court for which the writ should be granted. FIRREA provides for priority of payment:

> . . . amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims . . . in the following order of priority:
>
> * * *
>
> (iii) Any other general or senior liability of the institution. . . .
>
> (iv) Any obligation subordinated to depositors or general creditors. . . .[5]

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5. FDIC has already arranged for a distribution to subordinated creditors of Meritor holding capital notes.

> (V) Any obligation to shareholders or members arising as a result of their status as shareholders. . . .

12 U.S.C. § 1821(d)(11)(A).[6] The important question, not previously decided, is whether a person whose contract is repudiated and not paid is a general creditor who should be paid by the receiver before distribution to subordinated creditors and to shareholders.

Consideration of the issue involves an interpretation of FIRREA which will impact the winding up of the affairs of a depository institution in receivership. The Meritor receivership involves a receivership with a surplus. This Court must decide whether the repudiation power was intended to create a windfall for shareholders by eliminating the payment obligation even if there is a surplus, or whether the repudiation power was intended only to protect the deposit insurance fund in the event of a deficit. Resolution of the question by this Court is important to determine the obligation, if any, of the receiver to pay as general creditors parties whose contracts have been repudiated. The writ should be granted to review this important issue.

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6. The provision in effect until June 1997 was slightly different, but not in any respect material to the issue in this matter.

> DISTRIBUTION TO SHAREHOLDERS OF AMOUNTS REMAINING AFTER PAYMENT OF ALL OTHER CLAIMS AND EXPENSES. — In any case in which funds remain after all depositors, creditors, other claimants, and administrative expenses are paid, the receiver shall distribute such funds to the depository institution's shareholders. . . .

12 U.S.C. § 1821(d)(11)(B). The amendment was made to account for subordinated debtors.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS, THIRD CIRCUIT DECIDED MAY 1, 1997

John R. McCARRON, Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of Meritor Savings Bank and in its own capacity.

No. 96-1123.

United States Court of Appeals,
Third Circuit.

Argued Sept. 11, 1996.

Decided May 1, 1997.

* * *

Before: COWEN, LEWIS and WEIS, Circuit Judges.

OPINION OF THE COURT

LEWIS, Circuit Judge.

John R. McCarron, a former executive of Meritor Savings Bank, appeals from an order of the district court entering judgment for the defendant, the Federal Deposit Insurance Corporation, on his claims to recover severance pay and retirement benefits pursuant to the terms of his employment agreement with Meritor. The issues raised in this appeal are whether the district court erred in determining: (1) that McCarron's severance agreements fell within the scope of the

Appendix A

FDIC's valid repudiation of "severance pay" under our ruling in Hennessy v. FDIC, 58 F.3d 908 (3d Cir.1995); and (2) that McCarron's retirement benefits had not accrued and did become unconditionally fixed on or before the time Meritor was declared insolvent.

For the reasons which follow, we conclude that the FDIC's repudiation of McCarron's Severance Compensation Agreement was valid, and that no triggering event occurred which would entitle McCarron to severance payment under his Change in Control Agreement. Accordingly, we will affirm the district court's order on this issue; however, we will reverse and remand for further proceedings the district court's conclusion that McCarron's retirement agreement was not vested at the time Meritor was placed into receivership.

I.

In August, 1988, McCarron left his employment as a partner in a Philadelphia law firm to accept the position of Executive Vice President and General Counsel to Meritor Savings Bank, also in Philadelphia. McCarron entered into an employment contract with Meritor whereby McCarron would leave the law firm partnership and work for Meritor in exchange for a promise by Meritor to pay severance benefits under either of two mutually exclusive agreements. An "Agreement for Compensation On Discharge Subsequent to a Change in Control" provided that if the Bank discharged McCarron without cause in a "change in control," Meritor would agree to pay McCarron a lump sum severance payment in an amount equal to three times his annual salary, and to extend insurance benefits for 36 months. In the event that McCarron was discharged under circumstances other than a change in control, a "Severance Compensation

Agreement" provided that McCarron would receive twice his annual salary, as well as the continuation of certain health, accident and life insurance benefits for an additional 24 months.

McCarron was also covered under two additional plans. The "Separation Pay Plan," an ERISA-qualified employee welfare benefit plan covering all of Meritor's employees, provided severance pay based upon years of service with Meritor. In addition, Meritor provided McCarron coverage under its "Supplementary Unfunded Retirement Plan," a non-qualified pension plan providing retirement payments to highly paid executives to supplement those available under its qualified pension plan.

On December 11, 1992, the Secretary of Banking for the Commonwealth of Pennsylvania closed Meritor and appointed the FDIC as receiver. The FDIC entered into a purchase and assumption agreement with Mellon Bank the same day. Mellon Bank assumed Meritor's deposit liabilities and certain other liabilities, and purchased certain Meritor assets. The FDIC, as receiver, retained the liabilities not assumed by Mellon, along with the unpurchased Meritor assets, and proceeded to liquidate them for the benefit of Meritor's approved creditors.

On the day of the FDIC's appointment as receiver, McCarron attended a meeting along with other Meritor employees. The FDIC's Closing Manager, Jack Goodner, made a brief presentation. When he finished his remarks, a Meritor employee asked him whether severance benefits would be paid. Goodner thought not, but was unsure. After looking toward two other FDIC officials for guidance, both of whom shook their heads, Goodner responded "no." At the time this statement was made, neither Goodner nor the other FDIC representatives present were

aware of the existence of McCarron's employment agreement. The FDIC asserts that Goodner's statement serves as the basis for the FDIC's repudiation of all McCarron's severance agreements, relying on our decision in Hennessy v. FDIC, 58 F.3d 908 (3d Cir.1995), in which we found that Goodner's statement was sufficient to repudiate Meritor's Separation Pay Plan agreements for its other employees.

McCarron timely filed a claim for severance pay and pension payments with the FDIC. Near the expiration of the statutory period for the FDIC to consider the claims, the FDIC requested that McCarron agree to a six month extension, which he did. The FDIC failed to act on McCarron's claims within that six-month period.

The FDIC's inaction prompted McCarron to file suit against the FDIC as Meritor's receiver in federal district court. McCarron's suit sought to recover severance and supplemental pension benefits under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1821. He alleged that his severance and retirement agreements remained valid and enforceable against the FDIC in light of our decision in Hennessy. In response, the FDIC advanced a very different interpretation of Hennessy. It claimed that Hennessy compelled the conclusion that the agreements were unenforceable because Goodner's statement constituted a valid repudiation. The district court heard oral argument, after which the parties agreed to submit the case for adjudication on the stipulated facts. The district court then entered summary judgment in favor of the FDIC.

On appeal, McCarron contends that the district court erroneously concluded that the FDIC's repudiation of the

Separation Pay Plan, which we found to be valid in Hennessy as it related to other Meritor employees, controls McCarron's present claims for severance benefits. Alternatively, McCarron seeks "actual direct compensatory damages" under FIRREA for breach of those agreements. McCarron also invites us to explore the FDIC's "white knight" exception to its general ban on "golden parachutes."[1] Finally, he asserts that the FDIC is equitably and judicially estopped from denying his claims.

The district court had jurisdiction pursuant to 28 U.S.C. § 1331. We have jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. Our review of a district court's grant of summary judgment is plenary, and we are required to apply the same test the district court should have used initially. Chipollini v. Spencer Gifts, Inc., 814 F.2d 893, 896 (3d Cir. 1987) (en banc).

II.

This case considers the same facts underlying our decision in Hennessy v. FDIC, 58 F.3d 908 (3d Cir.1995). At issue is whether the district court properly determined that our finding of valid repudiation in Hennessy is controlling in the case of McCarron's present claims for severance pay.

The Hennessy plaintiffs were former middle managers of Meritor who sought to recover severance payments pursuant to Meritor's Separation Pay Plan. The district court held that while

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1. A golden parachute payment "is any payment (or agreement to make any payment) in the nature of compensation by any insured depository institution . . . that (i) is contingent on the termination of such party's affiliation with the institution or holding company; and (ii) is received on or after the date on which (II) any conservator or receiver is appointed for such institution. . . ." 12 U.S.C. § 1828(k)(4).

the "repudiation may have been informal, it was clear, unambiguous and reasonable under the circumstances." Hennessy v. FDIC, 858 F.Supp. 483, 488 (E.D.Pa.1994), aff'd, 58 F.3d 908 (3d Cir.1995). On appeal, we were asked to decide whether the FDIC was required to make formal findings that the terms of this plan were "burdensome" and that repudiation was necessary in order to "promote the orderly administration of the institution's affairs" pursuant to 12 U.S.C. § 1821(e)(1). We held that the FDIC's repudiation of the Separation Pay Plan was valid because "there is no basis in the statute or in the case law for requiring the FDIC, which has discretion in making the decision concerning whether to repudiate, to produce written findings." Hennessy, 58 F.3d at 920.

We note at the outset that in Hennessy, we were not called upon to address whether the FDIC's repudiation was valid against any agreements other than Meritor's Separation Pay Plans. It is therefore necessary to return once again to the events surrounding the FDIC's repudiation of December 11, 1992 in order to determine which of McCarron's severance agreements were validly repudiated.

A.

Section (e)(1) of FIRREA delineates the rights and obligations of the FDIC as receiver for a failed financial institution with respect to contracts entered into by the institution before the appointment of the receiver. That provision states that the receiver,

> may disaffirm or repudiate any contract or lease — (A) to which such institution is party; (B) the performance of which the

> conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and (C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C. § 1821(e)(1).

The receiver has broad discretion to determine what is burdensome, and a court's review of a decision by the FDIC to repudiate is narrowly circumscribed. 1185 Ave. of Americas Associates v. RTC, 22 F.3d 494, 498 (2d Cir. 1994); Howell v. FDIC, 986 F.2d 569, 572 (1st Cir.1993) ("[a] litigant would normally have an uphill battle in overturning an FDIC finding of 'burden'. . . ."). Once the receiver makes a finding that a contract is burdensome, it does not have to give reasons for its decision. 1185 Ave. of Americas Assoc., 22 F.3d at 498; Morton v. Arlington Heights Federal Savings and Loan Association, 836 F. Supp. 477, 485 (N.D.Ill.1993).

Thus, the relevant issue in reviewing the FDIC's decision to repudiate is not whether the FDIC official "considered everything possible in making [his] determinations or even whether he reached the 'right' decision; the question is whether he made the determination required . . . [e]ven if the determinations were based on incorrect perceptions of fact or incorrect assumptions about the governing law." See Employees' Retirement System of Alabama v. RTC, 840 F.Supp. 972, 983 (S.D.N.Y.1993). The receiver's repudiation decision will not be overturned absent an abuse of discretion. Atlantic Mechanical, Inc. v. RTC, 772 F.Supp. 288 (E.D.Va.1991), aff'd, 953 F.2d 637 (4th Cir.1992).

The receiver is required, however, to decide "within a reasonable period" after being appointed whether to exercise such repudiation power. 12 U.S.C. § 1821(e)(2). See also, RTC v. CedarMinn Building Ltd., 956 F.2d 1446, 1455 (8th Cir.1992) ("The amount of time that is reasonable for the FDIC to exercise its repudiation power under FIRREA must be determined by the circumstances of each case.").

In the context of informal repudiations of contracts under FIRREA, like the one at issue here, a valid repudiation requires that the receiver, after making its determination that a contract or a particularized class of contracts is burdensome, repudiates in a manner which is "clear, unambiguous and reasonable under the circumstances." Hennessy, 858 F.Supp. at 488; see also Lawson v. FDIC, 3 F.3d 11, 12 (1st Cir.1993).

B.

To support his contention that his Severance Compensation Agreement was never repudiated and remains a valid obligation of the receiver, McCarron points to the fact that the FDIC's repudiation was made in the context of a discussion regarding employee benefits in general, and that the FDIC closing team admitted that they had no knowledge of the existence of McCarron's agreements.

At first glance, McCarron's argument appears compelling. We are reluctant to impute to Goodner's repudiation, which was a response to a question whether severance would be honored, an intention to repudiate a contract where that intention may not have existed. Indeed, it would be highly speculative for us to impute to Goodner's statement anything more than an intention to repudiate standard severance packages, for that was

the focus of the question to which Goodner was responding. However, we believe that the FDIC's lack of specific knowledge of McCarron's Severance Compensation Agreement is inconsequential.

As we noted above, a receiver's determination as to whether a contract is burdensome to an institution will not be overturned but for an abuse of discretion. Even if the decision to repudiate Meritor's severance agreements had been made pursuant to a uniform policy of the FDIC to repudiate all severance pay agreements, it would still be proper. Hennessy, 58 F.3d at 920 ("If anything, such a longstanding policy [to consistently deny the same type of claim] demonstrates a conscious decision to promote uniform treatment of the same type of claim."). Under the circumstances surrounding the FDIC's repudiation, we are satisfied that it did not abuse its discretion in determining that, as a general matter, the payment of any and all severance claims would further burden a banking institution in financial ruin.

The question then arises whether the FDIC communicated clearly and unambiguously to McCarron that his Severance Compensation Agreement was repudiated. As we noted above, a valid repudiation under FIRREA requires that a receiver actually determine that a contract or particularized class of contracts is burdensome, and communicate repudiation of such contracts in an unambiguous manner. Here, Goodner was asked, on the day the FDIC was appointed receiver, whether "severance would be honored," to which he unambiguously responded "no." In our view, this repudiation was sufficient to place McCarron on notice that his Severance Compensation Agreement, which was a standard severance agreement virtually indistinguishable from the Separation Pay Plans, was likewise deemed to be a burden to the estate of Meritor. Thus, the FDIC's repudiation of

McCarron's Severance Compensation Agreement was "clear, unambiguous and reasonable under the circumstances." Hennessy v. FDIC, 858 F.Supp. 483, 488 (E.D.Pa.1994); cf. Lawson v. FDIC, 3 F.3d 11, 12 (1st Cir.1993) (repudiation of CD contracts was informal, but it was unambiguous, and therefore valid). The FDIC's repudiation of December 11, 1992, was therefore valid against this agreement.

Because we find that McCarron's Severance Compensation Agreement was properly repudiated, that repudiation gives rise to an ordinary claim for breach of contract. However, in most instances, the types of damages that may be recovered against the FDIC are limited to "actual direct compensatory damages," calculated as of the date of the appointment of the receiver. 12 U.S.C. § 1821(e)(3)(B).[2] In Hennessy, we explained that severance payments are " 'at best an estimate of likely harm made at a time when only prediction is possible' and are analogous to 'liquidated damages.' " Hennessy, 58 F.3d at 921

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2. FIRREA provides, in part, that:

> the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be —
>
> (i) limited to actual direct compensatory damages; and (ii) determined as of — (I) the date of the appointment of the conservator or receiver. . . . 12 U.S.C. § 1821(e)(3)(A). FIRREA further provides that "actual direct compensatory damages" do not include:
>
> (i) punitive or exemplary damages; (ii) damages for lost profits or opportunity; or (iii) damages for pain and suffering.

12 U.S.C. § 1821(e)(3)(B).

(citing Howell v. FDIC, 986 F.2d 569, 573 (1st Cir.1993)). We concluded, therefore, that damages relating to severance benefits are not compensable as "actual direct compensatory damages" under 12 U.S.C. § 1821. Hennessy, 58 F.3d at 921. In light of that conclusion, which we find equally applicable here, we will affirm the district court's order in favor of the FDIC on this issue.

C.

McCarron also argues that his Change in Control Agreement was never repudiated and therefore remains a valid obligation of the receiver. With respect to this agreement, we need not reach the question of repudiation, since the triggering events contemplated by it never occurred.

McCarron's Change in Control agreement defined a change in control as occurring when, among other things, there is "any sale, lease, exchange or other transfer (in one transaction or a series of related transactions) of all, or substantially all the assets of Meritor or its parent, or [by virtue of] the adoption of any plan or proposal for the liquidation or dissolution of Meritor." App. at 90. In order for such a change in control to trigger McCarron's entitlement to severance pay, the terms of the agreement itself require approval of "[t]he Board of Directors of Meritor or its parent [or, if such approval is not legally required, the shareholders]."

The "change in control" which took place when the Secretary of Banking for the Commonwealth of Pennsylvania closed Meritor was not one which was contemplated by McCarron's Change in Control agreement. In fact, the closing of Meritor effectively foreclosed the possibility of obtaining the

requisite approval to make McCarron's agreement enforceable. Because there was no event that triggered the payment of severance benefits under this contract, we will affirm the district court's order denying McCarron's claim in this respect, also. See also Hennessy, 58 F.3d at 918 (observing that when there is no event triggering the payment of severance benefits, it is ordinarily unnecessary to dispose of repudiation and damages issues in connection with severance pay).

III.

As an alternative ground for the payment of his severance claims, McCarron asserts that he qualifies for payment under the FDIC's rules permitting an institution to make golden parachute payments to a so-called "white knight."[3] The FDIC has acknowledged its awareness that,

> individuals who possess the experience and expertise which qualify them for [a position

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3. The white knight concept, of course, has its origins in the tale of the valiant knight who rescues the damsel in distress. In corporate law, the term white knight is usually meant to describe a "friendly suitor" and a "rival bidder that will save [a target company] from the first offeror by offering both the shareholders and themselves a more attractive deal." Robert C. Clark, Corporate Law 572 (1986). By way of comparison, a "gray knight" is simply a not-so-friendly third party that makes a competing bid. See Robert A. Prentice, Target Board Abuse of Defensive Tactics: Can Federal Law be Mobilized to Overcome the Business Judgment Rule?, 8 J. Corp. Law 337, 360 (1983). The FDIC uses the term white knight to refer to a highly sought after business person recruited by a troubled institution to reverse its slide toward economic failure. See 60 F.R. 16069, 10672. Under the FDIC regulations, such a business person is also called an "Institution-affiliated party." 12 C.F.R. 359.1(h).

> with a federally regulated institution or holding company] are highly sought after business persons who, in most circumstances, already have established successful careers with other financial institutions. In order to induce such an individual to leave an established, stable career for a job in a troubled institution which may not survive regardless of that individual's efforts, it is generally necessary to agree to pay that individual some sort of severance payment in the event that the efforts of the individual for the institution are not successful. It is the FDIC's view that . . . such agreements reflect good business judgment.

60 FR 16069, 16071 (March 29, 1995). But the FDIC's "white knight" exception to the ban on golden parachute payments is also subject to clearly defined limitations. The FDIC's rule itself, set out at 12 C.F.R. § 359.4, states that:

> (a) An insured depository institution or depository institution holding company may agree to make or may make a golden parachute payment if and to the extent that . . .
>
> (2) Such an agreement is made in order to hire a person to become an IAP [Institution-affiliated party] either at a time when the insured depository institution or depositor institution holding company satisfies or in an effort to prevent it from imminently

> satisfying any of the [enumerated factors involving insolvency], and the institution's appropriate federal banking agency and the Corporation consent in writing to the amount and terms of the golden parachute payment.
>
> * * * * * *
>
> In the event that the institution is placed into receivership or conservatorship, the FDIC and/or the institution's appropriate federal banking agency shall not be obligated to pay the promised golden parachute and the IAP shall not be accorded preferential treatment on the basis of such prior approval.

Thus, while McCarron may very well be a "white knight" under the terms of the FDIC regulation, he has failed to meet the requirement that the appropriate federal banking agency and the FDIC "consent in writing to the amount and terms of the golden parachute payment." 12 C.F.R. § 359.4. And because McCarron never obtained the requisite consent from the FDIC, there is no factual or legal basis to permit payment of McCarron's severance claims under the FDIC rules governing the white knight exception.

Moreover, even if McCarron had obtained written approval, the FDIC's regulations provide that "the appropriate federal banking agency shall not be obligated to pay the promised golden parachute . . . on the basis of such prior approval." 12 C.F.R. § 359.4(a)(2). Because Congress empowered the FDIC to prohibit, limit or eliminate golden parachute payments altogether, pursuant to 12 U.S.C. § 1828(k)(1), we have no doubt

that the FDIC acts within its broad discretion even if it chooses to pre-approve golden parachute payments and then later revoke that approval when an institution is placed into receivership. See, e.g., Hennessy, 858 F.Supp. at 487 ("The FDIC may prohibit or limit any golden parachute payments regardless of whether such payment is fixed and certain at the time of the institutions' insolvency."); Westport Bank & Trust Co. v. Geraghty, 865 F.Supp. 83, 85-86 (D. Conn.1994) (notwithstanding the designation of golden parachute payments as "trusts," the FDIC had statutory authority to disallow claims).

IV.

McCarron also argues that the FDIC is equitably and judicially estopped from denying his severance payments. In support of his equitable estoppel argument, McCarron contends that the FDIC was aware of his severance agreements but did not object to them, and did nothing to discourage him from relying on the security of the agreements. In addition, McCarron argues that the FDIC's position here is inconsistent with that which it took in prior litigation.

A judgment for McCarron on a theory of equitable estoppel would require us to find (1) a material misrepresentation, (2) reasonable reliance upon the misrepresentation, and (3) damage resulting from the misrepresentation. Heckler v. Community Health Serv., Inc., 467 U.S. 51, 59, 104 S.Ct. 2218, 2223, 81 L.Ed.2d 42 (1984); Gridley v. Cleveland Pneumatic Co., 924 F.2d 1310, 1319 (3d Cir.1991). Here, McCarron never established that the FDIC represented that he would be able to collect severance payments in the event that Meritor were placed in receivership. Moreover, McCarron cannot demonstrate reliance on the FDIC's regulation, issued more than three years

after he accepted employment. We therefore reject McCarron's equitable estoppel claim.

McCarron also contends that the FDIC should be judicially estopped from denying his claims due to the position it took in prior litigation. The prior litigation that McCarron refers to is the case of Howell v. FDIC, 986 F.2d 569 (1st Cir.1993), where the FDIC made various statements in its brief regarding the white knight exception to the ban on golden parachute payments.

Judicial estoppel prevents a party from assuming a position inconsistent with one which it took in a prior proceeding. Government of the Virgin Islands v. Paniagua, 922 F.2d 178, 183 (3d Cir.1990); Murray v. Silberstein, 882 F.2d 61, 66 (3d Cir.1989) ("the law of this circuit bar[s] switches of position of this kind"); Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 419 (3d Cir.1988). The purpose of judicial estoppel is to prevent a party from playing "fast and loose" with courts by asserting contradictory positions. United States v. Vastola, 989 F.2d 1318, 1324 (3d Cir.1993).

In its Howell brief, the FDIC asserted that the elements of the white knight exception to the ban on golden parachute payments are (1) commencement of employment when the institution was financially troubled, (2) the promise to make golden parachute payments arises at the outset of employment, (3) the person receiving the payment cannot be responsible for misconduct or the failure of the institution and (4) the proposed rules would not permit an exception in the absence of the FDIC's prior written approval of the payment. App. at 457.

In the course of the Howell litigation, the FDIC merely referred to a "white knight" exception in its brief in an attempt

to argue that public policy does not favor paying golden parachute benefits in circumstances where claimants had not been hired to help rescue a failing institution. Specifically, the FDIC noted that to overcome the general presumption against the payment of golden parachute payments, a claimant must fall under one of three narrowly-defined situations, which the plaintiffs in Howell did not. Speaking of the white knight exception, the FDIC explained that this exception could apply to "employees who, with full and unambiguous written prior approval by the FDIC and the appropriate regulatory authority, are induced to leave a stable position with another institution in order to try to prevent a troubled institution's failure. The exception thus has two key elements substantially limiting its scope." (emphasis in original). FDIC Howell Brief at 18. We find no inconsistency between the position the FDIC took in Howell and that which it takes here.

Moreover, the FDIC has not argued that the "white knight" exception to golden parachutes is invalid. To the contrary, the FDIC merely maintains that because McCarron failed to obtain prior written approval from the FDIC, there is no factual or legal basis for applying FDIC rules to permit payment of McCarron's claims. Since obtaining such approval is a condition precedent to the application of FDIC rules permitting payment, McCarron's judicial estoppel claim must also fail. See 12 U.S.C. § 1828(k)(1) (authorizing the FDIC to "prohibit or limit, by regulation or order, any golden parachute or indemnification payment").

V.

The validity of McCarron's "Supplementary Unfunded Retirement Plan" claim hinges upon whether his supplemental pension benefits had vested at the time of FDIC receivership.

See Hennessy, 58 F.3d at 918 ("To establish a claim against an insolvent bank in receivership, the liability of the bank must have accrued and become unconditionally fixed on or before the time it is declared insolvent.").

The district court determined that the provisions of this plan required that McCarron be employed at Meritor for five years before his entitlement to those benefits became vested. Because McCarron did not meet this requirement, the district court entered summary judgment in the FDIC's favor, denying the claim.

McCarron asserts that by virtue of his employment at Meritor, he is entitled to an accrued benefit under the retirement plan. He relies on paragraph seven of his initial employment contract, of which the district court opinion makes no mention. That paragraph states that "the retirement provisions of [McCarron's] agreement will have the practical effect of fully vesting [him] in the amount [he] accrue[s] at Meritor, regardless of [his] length of service." (emphasis added).

It is not disputed that Meritor waived the requirement for years of service in the Supplementary Unfunded Retirement Plan in order to compensate McCarron for the pension benefits from his prior employer that he surrendered when he accepted employment at Meritor. Nor do we see how this could reasonably be contested in view of the above-cited language of paragraph seven, which could not be any clearer. Accordingly, because the basis for the district court's denial of this claim was that McCarron's retirement benefits "had not vested" at the time of receivership, and this clearly is not the case, the district court's order will be reversed and remanded to determine the amount, if any, of accrued benefits to which McCarron is entitled under his retirement plan.

Appendix A

VI.

For the foregoing reasons, we will affirm the district court's grant of summary judgment with respect to McCarron's severance claims. In addition, we will reverse the district court's order with respect to McCarron's retirement claim under the Supplementary Unfunded Retirement Plan and remand for further consideration in light this opinion.[4]

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4. McCarron has submitted additional information to this Court pursuant to Rule 28(j) of Fed. R. of Appellate Procedure. The two documents are the FDIC's motion to intervene and substitute itself as party plaintiff to assert claims for damages to the failed financial institutions, and an accompanying memorandum. The memorandum indicates that Meritor Bank has sufficient assets to pay all creditors. McCarron therefore implies that the FDIC abused its discretion in finding his employment agreement to be a burden to the Meritor estate. However, even assuming that the Meritor estate is solvent, we are not in possession of facts which indicate when and how it became solvent and we are not willing to evaluate the FDIC's initial repudiation decision using 20/20 hindsight. Therefore, the fact that the FDIC appears to indicate in the memorandum, dated October 21, 1996, that Meritor is now solvent does not affect our decision.

APPENDIX B — OPINION-MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA ENTERED JANUARY 26, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
No. 94-1851

JOHN R. McCARRON,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of MERITOR SAVINGS BANK and in its own capacity

ORDER-MEMORANDUM

AND NOW, this **25th** day of **January, 1996**, upon consideration of Plaintiff's Motion for Summary Judgment (doc. no. 14) and the responses thereto (doc. nos. 17, 18, 20, 21, 24, 26-29), following oral argument on October 27, 1995, and upon agreement of the parties to submit the case for adjudication on the stipulated facts without the need for live testimony,[1] it is hereby **ORDERED** that **JUDGMENT** is entered for defendant and against plaintiff on the terms set forth below:

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1. In the alternative, the Court's disposition may also be deemed a *sua sponte* grant of summary judgment in favor of defendant: first, there is no genuine issue of material fact; second, the defendant is entitled to judgment as a matter of law; and third, the Court's Order of October 16, 1995, doc. no. 23, provided the parties with ample "notice and an opportunity to oppose summary judgment." *Otis Elevator Co. v. George Washington Hotel Corp.*, 27 F.3d 903, 910 (1d Cir. 1994).

Appendix B

1. Plaintiff John R. McCarron ("McCarron") brings this action to recover severance and supplemental pension benefits under the Financial Institutions Reform and Recovery Act ("FIRREA"), 12 U.S.C. § 1821, against defendant Federal Deposit Insurance Corporation ("FDIC") as Receiver of Meritor Savings Bank ("Meritor"). If, in the alternative, the Court finds that FDIC validly repudiated the severance agreements, plaintiff seeks "actual direct compensatory damages" for breach of the agreements.

2. McCarron, a former officer at Meritor, entered into two agreements with Meritor as a condition of his accepting employment with the bank. The first agreement, entitled "Agreement for Compensation on Discharge Subsequent to Change in Control" ("CIC"), provided plaintiff with "a lump sum severance payment in an amount equal to three times his annual salary" if a change in control occurred at Meritor and if plaintiff were discharged without cause within three years following the change in control. The second agreement, entitled "Severance Compensation Agreement" ("SCA"), provided plaintiff with benefits and a severance payment in "an amount equal to two times his annual compensation" if plaintiff's employment were terminated without cause. In addition to the CIC and SCA, McCarron was covered under two pension plans: the Separation Pay Plan ("SPP") an ERISA-qualified employee welfare benefit plan that provided severance pay based on an employee's years of service with Meritor, and the Supplementary Unfunded Retirement Plan ("SURP"), an unfunded, non-qualified pension plan.

3. On December 11, 1992, the Secretary of Banking of the Commonwealth of Pennsylvania closed Meritor and appointed the FDIC as Receiver. That afternoon, state and federal regulators

arrived at the bank and convened a meeting which plaintiff attended with other bank employees. The employees were informed that FDIC had been appointed Receiver of Meritor and that their employment with Meritor had been terminated. When FDIC's Closing Manager was asked whether severance benefits would be paid, he responded, "No." Plaintiff subsequently filed claims for severance benefits to which the FDIC never responded.

4. In adjudicating the validity of the severance agreements, the Court finds this case indistinguishable from *Hennessy v. FDIC*, which arose from the same failure of Meritor as the instant case. 58 F.3d 908 (3d Cir. 1995). Like McCarron, the *Hennessy* plaintiffs were former managers of Meritor who sought to recover severance payments pursuant to the SPP after the failure of the bank. *Id.* at 914. Plaintiffs attended the same December 11, 1992, meeting at which McCarron was also present. *Id.* at 913. Based on the events which transpired at this meeting, *see supra* ¶ 3, the Third Circuit concluded that "the FDIC repudiated [its obligations to pay severance benefits] pursuant to its statutory authority under 12 U.S.C. §1821."[2] *Id.* at 918-20.

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2. Section 1821(e)(1) provides, in pertinent part,

> In addition to any other rights a . . . receiver may have, the . . . receiver for any insured depository institution may disaffirm or repudiate any contract or lease —
>
> (A) to which such institution is a party;
>
> (B) the performance of which the . . . receiver, in the . . . receiver's discretion, determines to be burdensome; and
>
> (C) the disaffirmance or repudiation of

(Cont'd)

Additionally, the Third Circuit held that the *Hennessy* plaintiffs were not entitled to any actual direct compensatory damages resulting from the repudiation, since "these payments [were] analogous to 'liquidated damages' " and were therefore excludable under 12 U.S.C. § 1821(e)(3)(A).[3] *Id.* at 920-21.

(Cont'd)

> which the . . . receiver determines, in the . . . receiver's discretion, will promote the orderly administration of the institution's affairs.

12 U.S.C. § 1821(e)(1) (1989).

3. Section 1821(e)(3)(A), entitled "Claims for damages for repudiation," provides, in pertinent part,

> [T]he liability of the . . . receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be —
>
> (i) limited to actual direct compensatory damages. . . .

12 U.S.C. § 1821(e)(3)(A) (1989). Yet, subsection B, entitled "No liability for other damages," excludes certain types of damages:

> For purposes of subparagraph (A), the term "actual direct compensatory damages" does not include —
>
> (i) punitive or exemplary damages;
>
> (ii) damages from lost profits or opportunity; or
>
> (iii) damages for pain and suffering.

12 U.S.C. § 1821(e)(3)(B) (1989).

5. Clearly, the SCA in the instant case, as an agreement for "severance compensation," and the SPP, which is identical to the agreement in *Hennessy,* are controlled by the Third Circuit's finding of valid repudiation. McCarron's claims with respect to these two severance agreements must therefore fail. Whether the CIC qualifies as a severance agreement that has been validly repudiated requires closer examination.

6. The CIC clearly states that "it is designed to provide assurance that if there is a change in control of Meritor . . . and [McCarron] is discharged without cause . . . [McCarron] will be entitled to payments. . . ." Pl.'s Mot. Summ. J., doc. no. 14, Ex. C, at (unnumbered) 1. Furthermore, the CIC provides that the payments to which McCarron would be entitled would be in the form of "a lump sum *severance* payment in an amount equal to three times his annual salary." *Id.* at (unnumbered) 3 (emphasis added). The Court therefore concludes that the CIC is a severance agreement which has been validly repudiated under *Hennessy.*[4] Thus, McCarron's claim under the CIC must also be denied.

7. Finally, the Court turns to McCarron's SURP claim. Both parties agree that the validity of the SURP turns on whether the supplemental pension benefits had vested at the time of the FDIC receivership. Pl.'s Mot. Summ. J., doc. no. 14, at 35; Def.'s Opp'n to Pl.'s Mot. Summ. J., doc. no. 17, at 35; Mem. P. & A. Supp. Entry of J. for Def., doc. no. 28, at 14-17. *See also Hennessy,* 58 F.3d at 918 ("To establish a claim against an insolvent bank in receivership, the liability of the bank must have accrued and

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4. The issue of whether a change in control occurred at Meritor, thereby triggering the CIC agreement, is thus irrelevant to the outcome of this case.

become unconditionally fixed on or before the time it is declared insolvent.").[5]

8. McCarron's argument jumps to three conclusions: First, the FDIC has conceded that the amount due under the Qualified Pension Plan is payable to McCarron; therefore the Qualified Pension Plan may be deemed vested as of the date of the receivership. Second, because there is no practical difference between the Qualified Pension Plan and the SURP, the two plans may be deemed identical. Finally, plaintiff concludes, on the basis of the first and second conclusions, the SURP benefit, like the Qualified Pension Plan, has vested.

9. Yet, the Court finds that McCarron's benefits had vested under a provision in the Qualified Pension Plan which allows for vesting once the plan had been terminated. *See* Pl.'s Mot. Summ. J., doc. no. 14, Ex. D1, at 53. This termination was not effected by the FDIC until after the date of the receivership. Moreover, at the time FDIC was appointed as receiver of Meritor, McCarron had not been employed at Meritor the requisite number of years for his rights to have vested, not only under the Qualified Pension Plan, but also the SURP. Thus, the Court concludes that on December 11, 1992, McCarron's SURP benefits had not yet vested and that this claim must likewise fail.[6]

---

5. The Court finds plaintiff's arguments regarding the distinction between receiverships of solvent and insolvent banks and regarding the interpretation of the "white knight exception" to severance agreements, which was proposed by the FDIC but never enacted, to be without merit.

6. The Court distinguishes Judge Bechtle's decision in *Soriero v. FDIC*, 887 F. Supp. 103 (E.D. Pa. 1995). Unlike McCarron, who had neither reached the age of 65 nor completed five years of employment at

(Cont'd)

10. For the foregoing reasons, judgment shall be entered for defendant.[7]

AND IT IS SO ORDERED.

s/ Eduardo C. Robreno
EDUARDO C. ROBRENO, J.

(Cont'd)
Meritor on the date of the receivership, the plaintiff in *Soriero* "had reached an age prior to the FDIC's receivership, where he could have retired had he chosen to do so," and had "entered into [the] contract . . . six years before the FDIC took over." *Id.* at 108.

7. The Court finds that plaintiff's claim seeking declaratory judgment to be without merit for two reasons. First, the Secretary of Banking for the Commonwealth of Pennsylvania was not named as a party to this case. Second, plaintiff, as creditor, lacks standing under Pennsylvania law to bring a challenge to FDIC's receivership of Meritor. *See* 71 Pa. Stat. Ann. §733-605 (1990) ("Any institution of whose business or property the secretary has taken possession as receiver, may . . . apply to the court for an order requiring the secretary to show cause why he should not be enjoined from continuing as receiver."). Moreover, FIRREA provides no express grant permitting creditors to challenge receivers on the propriety of the receivership. *See also Hindes v. FDIC*, No. 94-2355, 1995 WL 534248, at *2-*3 (E.D. Pa. Sept. 6, 1995).

APPENDIX C — STIPULATION OF FACTS AND ISSUES IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED DECEMBER 19, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 94-1851

JOHN R. McCARRON

v.

FEDERAL DEPOSIT INSURANCE CORPORATION as Receiver of MERITOR SAVINGS BANK and in its own capacity

STIPULATION OF FACTS AND ISSUES

STIPULATION OF FACTS

It is hereby stipulated by and between Christopher A. Weals, Esquire for defendant Federal Deposit Insurance Corporation as receiver of Meritor Savings Bank ("FDIC-Receiver") and Jeffrey McCarron, Esquire for plaintiff John R. McCarron that the following facts may be entered in the record of this action as uncontested for purposes of this action only:

1. During 1988, Meritor Savings Bank had certain weaknesses in the condition of the Bank, including an inadequate level of capital; poor earnings performance, deteriorated asset quality, insufficient liquidity, too large an exposure to interest rate risk, and speculative activity in bond trading.

Appendix C

2. The FDIC desired an improvement in the operations of Meritor and in management of the bank.

3. During July 1988, a Memorandum of Understanding was agreed upon between FDIC in its Corporate capacity ("FDIC-Corporate") and Meritor which required action to bolster Meritorts financial position.

4. During July 1988, the Board of Directors of Meritor recruited Roger Hillas, former Chairman of PNC Financial Corporation and Provident National Bank and a respected Philadelphia banker, to become the Chairman and Chief Executive Officer of Meritor to head the executive management team.

5. The plan to install new executive management at Meritor was favorably regarded by FDIC-Corporate.

6. Hillas immediately recruited plaintiff to become an integral part of the executive management team as Executive Vice President and General Counsel.

7. Plaintiff was a partner in the law firm Ballard Spahr Andrews & Ingersoll until he joined Meritor during August 1988.

8. Exhibit 1 is the employment contract between plaintiff and Meritor.

9. Meritor entered into an Agreement for Compensation On Discharge Subsequent to a Change in Control (Exhibit 2) and a Severance Compensation Agreement (Exhibit 3) (collectively, the "Agreements") in accordance with the employment contract to induce plaintiff to leave the law firm partnership to go to Meritor.

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10. The employment contract and the Agreements would have been enforceable against Meritor or its successor if Plaintiff had been discharged according to its terms prior to the appointment of a receiver.

11. The employment contract was included as Exhibit 3HH of Form F-2 Annual Report to FDIC-Corporate by Meritor for 1988 filed on March 31, 1989.

12. The employment contract was identified in the material contracts section of the Form F-2 Annual Report to FDIC-Corporate by Meritor for each year from 1989 through and including 1991.

13. The Agreements were either explicitly described or the description provided in the proxy statement was incorporated by reference in the management remuneration and transactions section of Form F-2 Annual Report to FDIC by Meritor for each year from 1988 through and including 1991.

14. FDIC-Corporate knew about the employment contract and the Agreements.

15. FDIC-Corporate never expressed its disapproval about the employment contract or the Agreements to plaintiff or to Meritor.

16. FDIC-Receiver does not contend that FDIC-Corporate's approval was required for the employment contract or the Agreements to be effective.

17. In a 1991 memorandum, generated after the Meritor management changed, FDIC-Corporate, Division of Supervision, reported:

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> Management is favorably regarded relative to financial astuteness and ability to manage the loan portfolio. Policies are generally acceptable, and noted weaknesses were developed under the stewardship of former CEO Frederick Hammer. The Bank's present Chairman, Roger Hillas, leads a well qualified management team that understands the bank's problems and that has developed a strategic plan designed to resolve these problems. . . . [M]anagement has demonstrated the ability to actually reach the goals established by the strategic plans.

18. Reference to "management" at paragraph 17 necessarily includes plaintiff as part of Meritor management.

19. A plan ("Early Resolution Plan") was developed by Meritor and its consultants, Bankers Trust Company, for the sale of Meritor's remaining deposit system franchise and certain other assets, and the liquidation of the remaining assets of Meritor as described in Exhibit 4.

20. The Early Resolution Plan was presented to FDIC-Corporate by Meritor and Bankers Trust.

21. Meritor performed a comprehensive review of assets, contacted other financial institutions to determine their interest in acquiring the deposit system franchise, and prepared draft bidding materials for prospective acquirors of the deposit system franchise to implement the Early Resolution Plan.

22. FDIC-Corporate conducted an informal review of

Appendix C

Meritor assets to evaluate the plausability of the Early Resolution Plan, informally contacted potential acquirors to determine their interest in Meritor Savings Bank, and engaged outside counsel in connection with its review of the Early Resolution Plan.

23. On October 5, 1992 the Board of Directors of Meritor approved the following resolutions:

> BE IT RESOLVED THAT, the Federal Deposit Insurance Corporation is hereby given permission to make contacts and to enter into discussions with prospective bidders for the assets and/or deposits of Meritor Savings Bank, Philadelphia, Pennsylvania. Those contacted may be individuals or other banking organizations at the sole discretion of the Federal Deposit Insurance Corporation, and furthermore,
>
> Those parties contacted by the Federal Deposit Insurance Corporation who express an interest in the assets and/or deposits of Meritor Savings Bank, Philadelphia, Pennsylvania are hereby authorized to come into the Bank for the purpose of performing due diligence. The Federal Deposit Insurance Corporation will convey to each of these prospective bidders the extreme need for confidentiality.

24. The Pennsylvania Department of Banking took possession of Meritor on December 11, 1992 and FDIC was appointed the receiver.

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25. Contemporaneous with the appointment of the receiver, certain assets and liabilities, including Meritor's deposit system franchise, were sold to Mellon Bank, N.A. for a premium equal to 181 million dollars in a transaction that was structured in accordance with the provisions of the Purchase and Assumption Agreement between FDIC-Corporate, FDIC-Receiver and Mellon Bank attached as Exhibit "5".

26. Plaintiff was discharged from employment when the receiver was appointed by the Pennsylvania Department of Banking.

27. Prior to the appointment of the receiver, the Agreements had not been terminated.

28. Plaintiff was not discharged for cause as defined by the Agreements.

29. Plaintiff was not responsible for the alleged failure of Meritor.

30. Plaintiff timely submitted claims to FDIC for payment with respect to the employment contract and the Agreements.

31. FDIC requested that plaintiff agree to extend the time for FDIC to consider the claims.

32. Plaintiff agreed to extent the time for FDIC to consider the claims by 6 months.

33. Prior to this lawsuit, FDIC never responded to the claims submitted by plaintiff.

Appendix C

STIPULATION OF ISSUES

It is hereby stipulated by and between Christopher A. Weals, Esquire for defendant Federal Deposit Insurance Corporation as receiver of Meritor Savings Bank and Jeffrey McCarron, Esquire for plaintiff John R. McCarron that the only matters which are at issue, there being no dispute about any other issue material to a disposition of this action, are:

34. Whether the Agreements may form the basis of a provable claim against FDIC as receiver of Meritor Savings Bank.

35. Whether a change in control occurred as defined in the Agreement for Compensation On Discharge Subsequent to a Change in Control.

36. Whether the FDIC repudiated the Agreements.

37. If the FDIC repudiated the Agreements, what, if any, damages are due as a result thereof.

SWARTZ, CAMPBELL &
DETWEILER

By: s/ Jeffrey B. McCarron
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100 S. Broad Street
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Attorney for Plaintiff
John R. McCarron

Appendix C

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON

By: s/ Christopher A. Weals
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815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 463-2400

Attorney for Defendant,
Federal Deposit Insurance
Company as Receiver of
Meritor Savings Bank

DATE 12/19/94

APPENDIX D — DENIAL OF PETITION FOR REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JULY 8, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1123

JOHN R. McCARRON

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of MERITOR SAVINGS BANK and in its own capacity

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge,* BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, and WEIS*, *Circuit Judges.*

The petition for rehearing filed by appellant, John R. McCarron, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

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* Honorable Joseph F. Weis, Jr., sitting by designation, whose vote is limited to panel rehearing only.

Appendix D

BY THE COURT,

s/ illegible
Circuit Judge

Date: JUL – 8 1997

APPENDIX E — RELEVANT STATUTE

12 U.S.C. § 1821(d) & (e)

(d) Powers and duties of Corporation as conservator or receiver

(1) Rulemaking authority of Corporation

The Corporation may prescribe such regulations as the Corporation determines to be appropriate regarding the conduct of conservatorships or receiverships.

(2) General powers

(A) Successor to institution

The Corporation shall, as conservator or receiver, and by operation of law, succeed to —

(i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and

(ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

(B) Operate the institution

The Corporation may (subject to the provisions of section 1831q of this title), as conservator or receiver —

(i) take over the assets of and operate the insured depository institution with all the powers of the members or shareholders, the directors, and the officers of the institution and conduct all business of the institution;

(ii) collect all obligations and money due the institution;

(iii) perform all functions of the institution in the name of the institution which are consistent with the appointment as conservator or receiver; and

(iv) preserve and conserve the assets and property of such institution.

(C) Functions of institution's officers, directors, and shareholders

The Corporation may, by regulation or order, provide for the exercise of any function by any member or stockholder, director, or officer any insured depository institution for which the Corporation has been appointed conservator or receiver.

(D) Powers as conservator

The Corporation may, as conservator, take such action as may be —

(i) necessary to put the insured depository institution in a sound and solvent condition; and

(ii) appropriate to carry on the business of the institution and preserve and conserve the assets and property of the institution.

(E) Additional powers as receiver

The Corporation may (subject to the provisions of section 1831q of this title), as receiver, place the insured depository institution in liquidation and proceed to realize upon the assets of the institution, having due regard to the conditions of credit in the locality.

(F) Organization of new institutions

The Corporation may, as receiver —

(i) with respect to savings associations and by application to the Director of the Office of Thrift Supervision, organize a new Federal savings association to take over such assets or such liabilities as the Corporation may determine to be appropriate; and

(ii) with respect to any insured bank, organize a new national bank under subsection (m) of this section or a bridge bank under subsection (n) of this section.

(G) Merger; transfer of assets and liabilities

(i) In general

The Corporation may, as conservator or receiver —

(I) merge the insured depository institution with another insured depository institution; or

(II) subject to clause (ii), transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer.

(ii) Approval by appropriate Federal banking agency

No transfer described in clause (i)(II) may be made to another depository institution (other than a new bank or a bridge bank established pursuant to subsection (m) or (n) of this section) without the approval of the appropriate Federal banking agency for such institution.

(H) Payment of valid obligations

The Corporation, as conservator or receiver, shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter.

(I) Subpoena authority

(i) In general

The Corporation may, as conservator,

receiver, or exclusive manager and for purposes of carrying out any power, authority, or duty with respect to an insured depository institution (including determining any claim against the institution and determining and realizing upon any asset of any person in the course of collecting money due the institution), exercise any power established under section 1818(n) of this title, and the provisions of such section shall apply with respect to the exercise of any such power under this subparagraph in the same manner as such provisions apply under such section.

(ii) Authority of board of directors

A subpoena or subpoena duces tecum may be issued under clause (i) only by, or with the written approval of, the Board of Directors or their designees (or, in the case of a subpoena or subpoena duces tecum issued by the Resolution Trust Corporation under this subparagraph and section 1441 a(b)(4) of this title, only by, or with the written approval of, the Board of Directors of such Corporation or their designees).

(iii) Rule of construction

This subsection shall not be construed as limiting any rights that the Corporation, in any capacity, might otherwise have under section 1820(c) of this title.

Appendix E

(J) Incidental powers

The Corporation may, as conservator or receiver —

(i) exercise all powers and authorities specifically granted to conservators or receivers, respectively, under this chapter and such incidental powers as shall be necessary to carry out such powers; and

(ii) take any action authorized by this chapter, which the Corporation determines is in the best interests of the depository institution, its depositors, or the Corporation.

(K) Utilization of private sector

In carrying out its responsibilities in the management and disposition of assets from insured depository institutions, as conservator, receiver, or in its corporate capacity, the Corporation shall utilize the services of private persons, including real estate and loan portfolio asset management, property management, auction marketing, legal, and brokerage services, only if such services are available in the private sector and the Corporation determines utilization of such services is the most practicable, efficient, and cost effective.

(3) Authority of receiver to determine claims

(A) In general

The Corporation may, as receiver, determine claims

in accordance with the requirements of this subsection and regulations prescribed under paragraph (4).

(B) Notice requirements

The receiver, in any case involving the liquidation or winding up of the affairs of a closed depository institution, shall —

(i) promptly publish a notice to the depository institution's creditors to present their claims, together with proof, to the receiver by a date specified in the notice which shall be not less than 90 days after the publication of such notice; and

(ii) republish such notice approximately 1 month and 2 months, respectively, after the publication under clause (i).

(C) Mailing required

The receiver shall mail a notice similar to the notice published under subparagraph (B)(i) at the time of such publication to any creditor shown on the institution's books —

(i) at the creditor's last address appearing in such books; or

(ii) upon discovery of the name and address of a claimant not appearing on the institution's books within 30 days after the discovery of such name and address.

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(4) Rulemaking authority relating to determination of claims

(A) In general

The Corporation may prescribe regulations regarding the allowance or disallowance of claims by the receiver and providing for administrative determination of claims and review of such determination.

(B) Final settlement payment procedure

(i) In general

In the handling of receiverships of insured depository institutions, to maintain essential liquidity and to prevent financial disruption, the Corporation may, after the declaration of an institution's insolvency, settle all uninsured and unsecured claims on the receivership with a final settlement payment which shall constitute full payment and disposition of the Corporation's obligations to such claimants.

(ii) Final settlement payment

For purposes of clause (i), a final settlement payment shall be payment of an amount equal to the product of the final settlement payment rate and the amount of the uninsured and unsecured claim on the receivership; and

Appendix E

(iii) Final settlement payment rate

For purposes of clause (ii), the final settlement payment rate shall be a percentage rate reflecting an average of the Corporation's receivership recovery experience, determined by the Corporation in such a way that over such time period as the Corporation may deem appropriate, the Corporation in total will receive no more or less than it would have received in total as a general creditor standing in the place of insured depositors in each specific receivership.

(iv) Corporation authority

The Corporation may undertake such supervisory actions and promulgate such regulations as may be necessary to assure that the requirements of this section can be implemented with respect to each insured depository institution in the event of its insolvency.

(5) Procedures for determination of claims

(A) Determination period

(i) In general

Before the end of the 180-day period beginning on the date any claim against a depository institution is filed with the

Corporation as receiver, the Corporation shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim.

(ii) Extension of time

The period described in clause (i) may be extended by a written agreement between the claimant and the Corporation.

(iii) Mailing of notice sufficient

The requirements of clause (i) shall be deemed to be satisfied if the notice of any determination with respect to any claim is mailed to the last address of the claimant which appears —

(I) on the depository institution's books;

(II) in the claim filed by the claimant; or

(III) in documents submitted in proof of the claim.

(iv) Contents of notice of disallowance

If any claim filed under clause (i) is disallowed, the notice to the claimant shall contain —

(I) a statement of each reason for the disallowance; and

(II) the procedures available for obtaining agency review of the determination to disallow the claim or judicial determination of the claim.

(B) Allowance of proven claims

The receiver shall allow any claim received on or before the date specified in the notice published under paragraph (3)(B)(i) by the receiver from any claimant which is proved to the satisfaction of the receiver.

(C) Disallowance of claims filed after end of filing period

(i) In general

Except as provided in clause (ii), claims filed after the date specified in the notice published under paragraph (3)(B)(i) shall be disallowed and such disallowance shall be final.

(ii) Certain exceptions

Clause (i) shall not apply with respect to any claim filed by any claimant after the date specified in the notice published under paragraph (3)(B)(i) and such claim may be considered by the receiver if —

(I) the claimant did not receive notice of the appointment of the receiver in time to file such claim before such date; and

(II) such claim is filed in time to permit payment of such claim.

(D) Authority to disallow claims

(i) In general

The receiver may disallow any portion of any claim by a creditor or claim of security, preference, or priority which is not proved to the satisfaction of the receiver.

(ii) Payments to less than fully secured creditors

In the case of a claim of a creditor against an insured depository institution which is secured by any property or other asset of such institution, any receiver appointed for any insured depository institution —

(I) may treat the portion of such claim which exceeds an amount equal to the fair market value of such property or other asset as an unsecured claim against the institution; and

(II) may not make any payment with respect to such unsecured portion of the claim other than in connection with the disposition of all claims of unsecured creditors of the institution.

(iii) Exceptions

No provision of this paragraph shall apply with respect to —

(I) any extension of credit from any Federal home loan bank or Federal Reserve bank to any insured depository institution; or

(II) any security interest in the assets of the institution securing any such extension of credit.

(E) No judicial review of determination pursuant to subparagraph (d)

No court may review the Corporation's determination pursuant to subparagraph (D) to disallow a claim.

(F) Legal effect of filing

(i) Statute of limitation tolled

For purposes of any applicable statute of

limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) No prejudice to other actions

Subject to paragraph (12), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver.

(6) Provision for agency review or judicial determination of claims

(A) In general

Before the end of the 60-day period beginning on the earlier of —

(i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a depository institution for which the Corporation is receiver; or

(ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i),

the claimant may request administrative review of the claim in accordance with subparagraph (A) or (B) of paragraph (7) or file suit on such claim (or continue an action commenced before the appointment of the

receiver) in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).

(B) Statute of limitations

If any claimant fails to —

(i) request administrative review of any claim in accordance with subparagraph (A) or (B) of paragraph (7); or

(ii) file suit on such claim (or continue an action commenced before the appointment of the receiver),

before the end of the 60-day period described in subparagraph (A), the claim shall be deemed to be disallowed (other than any portion of such claim which was allowed by the receiver) as of the end of such period, such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(7) Review of claims

(A) Administrative hearing

If any claimant requests review under this

subparagraph in lieu of filing or continuing any action under paragraph (6) and the Corporation agrees to such request, the Corporation shall consider the claim after opportunity for a hearing on the record. The final determination of the Corporation with respect to such claim shall be subject to judicial review under chapter 7 of Title 5.

(B) Other review procedures

(i) In general

The Corporation shall also establish such alternative dispute resolution processes as may be appropriate for the resolution of claims filed under paragraph (5)(A)(i).

(ii) Criteria

In establishing alternative dispute resolution processes, the Corporation shall strive for procedures which are expeditious, fair, independent, and low cost.

(iii) Voluntary binding or nonbinding procedures

The Corporation may establish both binding and nonbinding processes, which may be conducted by any government or private party, but all parties, including the claimant and the Corporation, must agree to the use of the process in a particular case.

Appendix E

(iv) Consideration of incentives

The Corporation shall seek to develop incentives for claimants to participate in the alternative dispute resolution process.

(8) Expedited determination of claims

(A) Establishment required

The Corporation shall establish a procedure for expedited relief outside of the routine claims process established under paragraph (5) for claimants who —

(i) allege the existence of legally valid and enforceable or perfected security interests in assets of any depository institution for which the Corporation has been appointed receiver; and

(ii) allege that irreparable injury will occur if the routine claims procedure is followed.

(B) Determination period

Before the end of the 90-day period beginning on the date any claim is filed in accordance with the procedures established pursuant to subparagraph (A), the Corporation shall —

(i) determine —

(I) whether to allow or disallow such claim; or

(II) whether such claim should be determined pursuant to the procedures established pursuant to paragraph (5); and

(ii) notify the claimant of the determination, and if the claim is disallowed, provide a statement of each reason for the disallowance and the procedure for obtaining agency review or judicial determination.

(C) Period for filing or renewing suit

Any claimant who files a request for expedited relief shall be permitted to file a suit, or to continue a suit filed before the appointment of the receiver, seeking a determination of the claimant's rights with respect to such security interest after the earlier of —

(i) the end of the 90-day period begirnung on the date of the filing of a request for expedited relief; or

(ii) the date the Corporation denies the claim.

(D) Statute of limitations

If an action described in subparagraph (C) is not filed, or the motion to renew a previously filed suit is not made, before the end of the 30-day period beginning on the date on which such action or motion may be

filed in accordance with subparagraph (B), the claim shall be deemed to be disallowed as of the end of such period (other than any portion of such claim which was allowed by the receiver), such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(E) Legal effect of filing

(i) Statute of limitation tolled

For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) No prejudice to other actions

Subject to paragraph (12), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver.

(9) Agreement as basis of claim

(A) Requirements

Except as provided in subparagraph (B), any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation.

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(B) Exception to contemporaneous execution requirement

Notwithstanding section 1823(e)(2) of this title, any agreement relating to an extension of credit between a Federal home loan bank or Federal Reserve bank and any insured depository institution which was executed before the extension of credit by such bank to such institution shall be treated as having been executed contemporaneously with such extension of credit for purposes of subparagraph (A).

(10) Payment of claims

(A) In general

The receiver may, in the receiver's discretion and to the extent funds are available, pay creditor claims which are allowed by the receiver, approved by the Corporation pursuant to a final determination pursuant to paragraph (7) or (8), or determined by the final judgment of any court of competent jurisdiction in such manner and amounts as are authorized under this chapter.

(B) Payment of dividends on claims

The receiver may, in the receiver's sole discretion, pay dividends on proved claims at any time, and no liability shall attach to the Corporation (in such Corporation's corporate capacity or as receiver), by reason of any such payment, for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment.

Appendix E

(11) Depositor preference

(A) In general

Subject to section 1815(e)(2)(C) of this title, amounts realized from the liquidation or other resolution of any insured depository institution by any receiver appointed for such institution shall be distributed to pay claims (other than secured claims to the extent of any such security) in the following order of priority:

(i) Administrative expenses of the receiver.

(ii) Any deposit liability of the institution.

(iii) Any other general or senior liability of the institution (which is not a liability described in clause (iv) or (v)).

(iv) Any obligation subordinated to depositors or general creditors (which is not an obligation described in clause (v)).

(v) Any obligation to shareholders or members arising as a result of their status as shareholders or members (including any depository institution holding company or any shareholder or creditor of such company).

Appendix E

(B) Effect on State law

(i) In general

The provisions of subparagraph (A) shall not supersede the law of any State except to the extent such law is inconsistent with the provisions of such subparagraph, and then only to the extent of the inconsistency.

(ii) Procedure for determination of inconsistency

Upon the Corporation's own motion or upon the request of any person with a claim described in subparagraph (A) or any State which is submitted to the Corporation in accordance with procedures which the Corporation shall prescribe, the Corporation shall determine whether any provision of the law of any State is inconsistent with any provision of subparagraph (A) and the extent of any such inconsistency.

(iii) Judicial review

The final determination of the Corporation under clause (ii) shall be subject to judicial review under chapter 7 of Title 5.

(C) Accounting report

Any distribution by the Corporation in connection

with any claim described in subparagraph (A)(v) shall be accompanied by the accounting report required under paragraph (15)(B).

(12) Suspension of legal actions

(A) In general

After the appointment of a conservator or receiver for an insured depository institution, the conservator or receiver may request a stay for a period not to exceed —

(i) 45 days, in the case of any conservator; and

(ii) 90 days, in the case of any receiver,

in any judicial action or proceeding to which such institution is or becomes a party.

(B) Grant of stay by all courts required

Upon receipt of a request by any conservator or receiver pursuant to subparagraph (A) for a stay of any judicial action or proceeding in any court with jurisdiction of such action or proceeding, the court shall grant such stay as to all parties.

(13) Additional rights and duties

(A) Prior final adjudication

The Corporation shall abide by any final

unappealable judgment of any court of competent jurisdiction which was rendered before the appointment of the Corporation as conservator or receiver.

(B) Rights and remedies of conservator or receiver

In the event of any appealable judgment, the Corporation as conservator or receiver shall —

(i) have all the rights and remedies available to the insured depository institution (before the appointment of such conservator or receiver) and the Corporation in its corporate capacity, including removal to Federal court and all appellate rights; and

(ii) not be required to post any bond in order to pursue such remedies.

(C) No attachment or execution

No attachment or execution may issue by any court upon assets in the possession of the receiver.

(D) Limitation on judicial review

Except as otherwise provided in this subsection, no court shall have jurisdiction over —

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been

appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or

(ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

(E) Disposition of assets

In exercising any right, power, privilege, or authority as conservator or receiver in connection with any sale or disposition of assets of any insured depository institution for which the Corporation has been appointed conservator or receiver, including any sale or disposition of assets acquired by the Corporation under section 1823(d)(1) of this title, the Corporation shall conduct its operations in a manner which —

(i) maximizes the net present value return from the sale or disposition of such assets;

(ii) minimizes the amount of any loss realized in the resolution of cases;

(iii) ensures adequate competition and fair and consistent treatment of offerors;

(iv) prohibits discrimination on the basis of race, sex, or ethnic groups in the solicitation and consideration of offers; and

(v) maximizes the preservation of the

availability and affordability of residential real property for low- and moderate-income individuals.

(14) Statute of limitations for actions brought by conservator or receiver

(A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be —

(i) in the case of any contract claim, the longer of —

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law; and

(ii) in the case of any tort claim (other than a claim which is subject to section 1441 a(b)(14) of this title), the longer of —

(I) the 3-year period beginning on the date the claim accrues; or

(II) the period applicable under State law.

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(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitations begins to run on any claim described in such subparagraph shall be the later of —

(i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

(C) Revival of expired State causes of action

(i) In general

In the case of any tort claim described in clause (ii) for which the statute of limitation applicable under State law with respect to such claim has expired not more than 5 years before the appointment of the Corporation as conservator or receiver, the Corporation may bring an action as conservator or receiver on such claim without regard to the expiration of the statute of limitation applicable under State law.

(ii) Claims described

A tort claim referred to in clause (i) is a claim arising from fraud, intentional

misconduct resulting in unjust enrichment, or intentional misconduct resulting in substantial loss to the institution.

(15) Accounting and recordkeeping requirements

(A) In general

The Corporation as conservator or receiver shall, consistent with the accounting and reporting practices and procedures established by the Corporation, maintain a full accounting of each conservatorship and receivership or other disposition of institutions in default.

(B) Annual accounting or report

With respect to each conservatorship or receivership to which the Corporation was appointed, the Corporation shall make an annual accounting or report, as appropriate, available to the Secretary of the Treasury, the Comptroller General of the United States, and the authority which appointed the Corporation as conservator or receiver.

(C) Availability of reports

Any report prepared pursuant to subparagraph (B) shall be made available by the Corporation upon request to any shareholder of the depository institution for which the Corporation was appointed conservator or receiver or any other member of the public.

Appendix E

(D) Recordkeeping requirement

After the end of the 6-year period beginning on the date the Corporation is appointed as receiver of an insured depository institution, the Corporation may destroy any records of such institution which the Corporation, in the Corporation's discretion, determines to be unnecessary unless directed not to do so by a court of competent jurisdiction or governmental agency, or prohibited by law.

(16) Contracts with state housing finance authorities

(A) In general

The Corporation may enter into contracts with any State housing finance authority for the sale of mortgage-related assets (as such terms are defined in section 1441a-1 of this title) of any depository institution in default (including assets and liabilities associated with any trust business), such contracts to be effective in accordance with their terms without any further approval, assignment, or consent with respect thereto.

(B) Factors to consider

In evaluating the disposition of mortgage related assets to any State housing finance authority the Corporation shall consider —

(i) the State housing finance authority's ability to acquire and service current,

delinquent, and defaulted mortgage related assets;

(ii) the State housing finance authority's ability to further national housing policies;

(iii) the State housing finance authority's sensitivity to the impact of the sale of mortgage related assets upon the State and local communities;

(iv) the costs to the Federal Government associated with alternative ownership or disposition of the mortgage related assets;

(v) the minimization of future guaranties which may be required of the Federal Government;

(vi) the maximization of mortgage related asset values; and

(vii) the utilization of institutions currently established in mortgage related asset market activities.

(17) Fraudulent transfers

(A) In general

The Corporation, as conservator or receiver for any insured depository institution, and any conservator appointed by the Comptroller of the Currency or the

Appendix E

Director of the Office of Thrift Supervision may avoid a transfer of any interest of an institution-affiliated party, or any person who the Corporation or conservator determines is a debtor of the institution, in properly, or any obligation incurred by such party or person, that was made within 5 years of the date on which the Corporation or conservator was appointed conservator or receiver if such party or person voluntarily or involuntarily made such transfer or incurred such liability with the intent to hinder, delay, or defraud the insured depository institution, the Corporation or other conservator, or any other appropriate Federal banking agency.

(B) Right of recovery

To the extent a transfer is avoided under subparagraph (A), the Corporation or any conservator described in such subparagraph may recover, for the benefit of the insured depository institution, the property transferred, or, if a court so orders, the value of such property (at the time of such transfer) from —

(i) the initial transferee of such transfer or the institution-affiliated party or person for whose benefit such transfer was made; or

(ii) any immediate or mediate transferee of any such initial transferee.

(C) Rights of transferee or obligee

The Corporation or any conservator described in

subparagraph (A) may not recover under subparagraph (B) from —

(i) any transferee that takes for value, including satisfaction or securing of a present or antecedent debt, in good faith; or

(ii) any immediate or mediate good faith transferee of such transferee.

(D) Rights under this paragraph

The rights under this paragraph of the Corporation and any conservator described in subparagraph (A) shall be superior to any rights of a trustee or any other party (other than any party which is a Federal agency) under Title 11.

(18) Attachment of assets and other injunctive relief

Subject of paragraph (19), any court of competent jurisdiction may, at the request of —

(A) the Corporation (in the Corporation's capacity as conservator or receiver for any insured depository institution or in the Corporation's corporate capacity with respect to any asset acquired or liability assumed by the Corporation under section 1821, 1822, or 1823 of this title); or

(B) any conservator appointed by the Comptroller of the Currency or the Director of the Office of Thrift Supervision,

issue an order in accordance with Rule 65 of the Federal Rules of Civil Procedure, including an order placing the assets of any person designated by the Corporation or such conservator under the control of the court and appointing a trustee to hold such assets.

(19) Standards

(A) Showing

Rule 65 of the Federal Rules of Civil Procedure shall apply with respect to any proceeding under paragraph (18) without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate.

(B) State proceeding

If, in the case of any proceeding in a State court, the court determines that rules of civil procedure available under the laws of such State provide substantially similar protections to such party's right to due process as Rule 65 (as modified with respect to such proceeding by subparagraph (A)), the relief sought by the Corporation or a conservator pursuant to paragraph (18) may be requested under the laws of such State.

(20) Treatment of claims arising from breach of contracts executed by the receiver or conservator

Notwithstanding any other provision of this subsection, any final and unappealable judgment for monetary damages entered

against a receiver or conservator for an insured depository institution for the breach of an agreement executed or approved by such receiver or conservator after the date of its appointment shall be paid as an administrative expense of the receiver or conservator. Nothing in this paragraph shall be construed to limit the power of a receiver or conservator to exercise any rights under contract or law, including to terminate, breach, cancel, or otherwise discontinue such agreement.

(e) Provisions relating to contracts entered into before appointment of conservator or receiver

(1) Authority to repudiate contracts

In addition to any other rights a conservator or receiver may have, the conservator or receiver for any insured depository institution may disaffirm or repudiate any contract or lease —

(A) to which such institution is a party;

(B) the performance of which the conservator or receiver, in the conservator's or receiver's discretion, determines to be burdensome; and

(C) the disaffirmance or repudiation of which the conservator or receiver determines, in the conservator's or receiver's discretion, will promote the orderly administration of the institution's affairs.

(2) Timing of repudiation

The conservator or receiver appointed for any insured depository institution in accordance with subsection (c) of this

section shall determine whether or not to exercise the rights of repudiation under this subsection within a reasonable period following such appointment.

(3) Claims for damages for repudiation

(A) In general

Except as otherwise provided in subparagraph (C) and paragraphs (4), (5), and (6), the liability of the conservator or receiver for the disaffirmance or repudiation of any contract pursuant to paragraph (1) shall be —

(i) limited to actual direct compensatory damages; and

(ii) determined as of —

(I) the date of the appointment of the conservator or receiver; or

(II) in the case of any contract or agreement referred to in paragraph (8), the date of the disaffirmance or repudiation of such contract or agreement.

(B) No liability for other damages

For purposes of subparagraph (A), the term "actual direct compensatory damages" does not include —

(i) punitive or exemplary damages;

(ii) damages for lost profits or opportunity; or

(iii) damages for pain and suffering.

(C) Measure of damages for repudiation of financial contracts

In the case of any qualified financial contract or agreement to which paragraph (8) applies, compensatory damages shall be —

(i) deemed to include normal and reasonable costs of cover or other reasonable measures of damages utilized in the industries for such contract and agreement claims; and

(ii) paid in accordance with this subsection and subsection (i) of this section except as otherwise specifically provided in this section.

(4) Leases under which the institution is the lessee

(A) In general

If the conservator or receiver disaffirms or repudiates a lease under which the insured depository institution was the lessee, the conservator or receiver shall not be liable for any damages (other than damages determined pursuant to subparagraph (B)) for the disaffirmance or repudiation of such lease.

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(B) Payments of rent

Notwithstanding subparagraph (A), the lessor under a lease to which such subparagraph applies shall —

(i) be entitled to the contractual rent accruing before the later of the date —

(I) the notice of disaffirmance or repudiation is mailed; or

(II) the disaffirmance or repudiation becomes effective, unless the lessor is in default or breach of the terms of the lease;

(ii) have no claim for damages under any acceleration clause or other penalty provision in the lease; and

(iii) have a claim for any unpaid rent, subject to all appropriate offsets and defenses, due as of the date of the appointment which shall be paid in accordance with this subsection and subsection (i) of this section.

(5) Leases under which the institution is the lessor

(A) In general

If the conservator or receiver repudiates an unexpired written lease of real property of the insured

depository institution under which the institution is the lessor and the lessee is not, as of the date of such repudiation, in default, the lessee under such lease may either —

(i) treat the lease as terminated by such repudiation; or

(ii) remain in possession of the leasehold interest for the balance of the term of the lease unless the lessee defaults under the terms of the lease after the date of such repudiation.

(B) Provisions applicable to lessee remaining in possession

If any lessee under a lease described in subparagraph (A) remains in possession of a leasehold interest pursuant to clause (ii) of such subparagraph —

(i) the lessee —

(I) shall continue to pay the contractual rent pursuant to the terms of the lease after the date of the repudiation of such lease;

(II) may offset against any rent payment which accrues after the date of the repudiation of the lease, any damages which accrue after such date due to the nonperformance of any obligation of the insured depository

institution under the lease after such date; and

(ii) the conservator or receiver shall not be liable to the lessee for any damages arising after such date as a result of the repudiation other than the amount of any offset allowed under clause (i)(II).

(6) Contracts for the sale of real property

(A) In general

If the conservator or receiver repudiates any contract (which meets the requirements of each paragraph of section 1823(e) of this title) for the sale of real property and the purchaser of such real property under such contract is in possession and is not, as of the date of such repudiation, in default, such purchaser may either —

(i) treat the contract as terminated by such repudiation; or

(ii) remain in possession of such real property.

(B) Provisions applicable to purchaser remaining in possession

If any purchaser of real property under any contract described in subparagraph (A) remains in possession of such property pursuant to clause (ii) of such subparagraph —

(i) the purchaser —

(I) shall continue to make all payments due under the contract after the date of the repudiation of the contract; and

(II) may offset against any such payments any damages which accrue after such date due to the nonperformance (after such date) of any obligation of the depository institution under the contract; and

(ii) the conservator or receiver shall —

(I) not be liable to the purchaser for any damages arising after such date as a result of the repudiation other than the amount of any offset allowed under clause (i)(II);

(II) deliver title to the purchaser in accordance with the provisions of the contract; and

(III) have no obligation under the contract other than the performance required under subclause (II).

(C) Assignment and sale allowed

(i) In general

No provision of this paragraph shall be construed as limiting the right of the conservator or receiver to assign the contract described in subparagraph (A) and sell the property subject to the contract and the provisions of this paragraph.

(ii) No liability after assignment and sale

If an assignment and sale described in clause (i) is consummated, the conservator or receiver shall have no further liability under the contract described in subparagraph (A) or with respect to the real property which was the subject of such contract.

(7) Provisions applicable to service contracts

(A) Services performed before appointment

In the case of any contract for services between any person and any insured depository institution for which the Corporation has been appointed conservator or receiver, any claim of such person for services performed before the appointment of the conservator or the receiver shall be —

(i) a claim to be paid in accordance with subsections (d) and (i) of this section; and

(ii) deemed to have arisen as of the date the conservator or receiver was appointed.

(B) Services performed after appointment and prior to repudiation

If, in the case of any contract for services described in subparagraph (A), the conservator or receiver accepts performance by the other person before the conservator or receiver makes any determination to exercise the right of repudiation of such contract under this section —

(i) the other party shall be paid under the terms of the contract for the services performed; and

(ii) the amount of such payment shall be treated as an administrative expense of the conservatorship or receivership.

(C) Acceptance of performance no bar to subsequent repudiation

The acceptance by any conservator or receiver of services referred to in subparagraph (B) in connection with a contract described in such subparagraph shall not affect the right of the conservator or receiver to repudiate such contract under this section at any time after such performance.

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(8) Certain qualified financial contracts

(A) Rights of parties to contracts

Subject to paragraph (10) of this subsection and notwithstanding any other provision of this chapter (other than subsection (d)(9) of this section and section 1823(e) of this title), any other Federal law, or the law of any State, no person shall be stayed or prohibited from exercising —

(i) any right to cause the termination or liquidation of any qualified financial contract with an insured depository institution which arises upon the appointment of the Corporation as receiver for such institution at any time after such appointment;

(ii) any right under any security arrangement relating to any contract or agreement described in clause (i); or

(iii) any right to offset or net out any termination value, payment amount, or other transfer obligation arising under or in connection with I or more contracts and agreements described in clause (i), including any master agreement for such contracts or agreements.

(B) Applicability of other provisions

Subsection (d)(12) of this section shall apply in

the case of any judicial action or proceeding brought against any receiver referred to in subparagraph (A), or the insured depository institution for which such receiver was appointed, by any party to a contract or agreement described in subparagraph (A)(i) with such institution.

(C) Certain transfers not avoidable

(i) In general

Notwithstanding paragraph (11), the Corporation, whether acting as such or as conservator or receiver of an insured depository institution, may not avoid any transfer of money or other property in connection with any qualified financial contract with an insured depository institution.

(ii) Exception for certain transfers

Clause (i) shall not apply to any transfer of money or other property in connection with any qualified financial contract with an insured depository institution if the Corporation determines that the transferee had actual intent to hinder, delay, or defraud such institution, the creditors of such institution, or any conservator or receiver appointed for such institution.

(D) Certain contracts and agreements defined

For purposes of this subsection —

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(i) Qualified financial contract

The term "qualified financial contract" means any securities contract, commodity contract, forward contract, repurchase agreement, swap agreement, and any similar agreement that the Corporation determines by regulation to be a qualified financial contract for purposes of this paragraph.

(ii) Securities contract

The term "securities contract" —

(I) has the meaning given to such term in section 741 of Title 11 except that the term "security" (as used in such section) shall be deemed to include any mortgage loan, any mortgage-related security (as defined in section 78c(a)(41) of Title 15), and any interest in any mortgage loan or mortgage-related security; and

(II) does not include any participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such participation within the meaning of such term.

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(iii) Commodity contract

The term "commodity contract" has the meaning given to such term in section 761 of Title 11.

(iv) Forward contract

The term "forward contract" has the meaning given to such term in section 101 of Title 11.

(v) Repurchase agreement

The term "repurchase agreement" —

(I) has the meaning given to such term in section 101 of Title 11, except that the items (as described in such section) which may be subject to any such agreement shall be deemed to include mortgage-related securities (as such term is defined in section 78c(a)(41) of Title 15), any mortgage loan, and any interest in any mortgage loan; and

(II) does not include any participation in a commercial mortgage loan unless the Corporation determines by regulation, resolution, or order to include any such participation within the meaning of such term.

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(vi) Swap agreement

The term "swap agreement" —

(I) means any agreement, including the terms and conditions incorporated by reference in any such agreement, which is a rate swap agreement, basis swap, commodity swap, forward rate agreement, interest rate future, interest rate option purchased, forward foreign exchange agreement, rate cap agreement, rate floor agreement, rate collar agreement, currency swap agreement, cross-currency rate swap agreement, currency future, or currency option purchased or any other similar agreement, and

(II) includes any combination of such agreements and any option to enter into any such agreement.

(vii) Treatment of master agreement as 1 swap agreement

Any master agreement for any agreements described in clause (vi)(I) together with all supplements to such master agreement shall be treated as 1 swap agreement.

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(viii) Transfer

The term "transfer" has the meaning given to such term in section 101 of Title 11.

(E) Certain protections in event of appointment of conservator

Notwithstanding any other provision of this chapter (other than paragraph (12) of this subsection, subsection (d)(9) of this section, and section 1823(e) of this title), any other Federal law, or the law of any State, no person shall be stayed or prohibited from exercising —

(i) any right such person has to cause the termination, liquidation, or acceleration of any qualified financial contract with a depository institution in a conservatorship based upon a default under such financial contract which is enforceable under applicable noninsolvency law;

(ii) any right under any security arrangement relating to such qualified financial contracts; or

(iii) any right to offset or net out any termination values, payment amounts, or other transfer obligations arising under or in connection with such qualified financial contracts.

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(9) Transfer of qualified financial contracts

In making any transfer of assets or liabilities of a depository institution in default which includes any qualified financial contract, the conservator or receiver for such depository institution shall either —

(A) transfer to 1 depository institution (other than a depository institution in default) —

(i) all qualified financial contracts between —

(I) any person or any affiliate of such person; and

(II) the depository institution in default;

(ii) all claims of such person or any affiliate of such person against such depository institution under any such contract (other than any claim which, under the terms of any such contract, is subordinated to the claims of general unsecured creditors of such institution);

(iii) all claims of such depository institution against such person or any affiliate of such person under any such contract; and

(iv) all property securing any claim described in clause (ii) or (iii) under any such contract; or

(B) transfer none of the financial contracts, claims, or property referred to in subparagraph (A) (with respect to such person and any affiliate of such person).

(10) Notification of transfer

(A) In general

If —

(i) the conservator or receiver for an insured depository institution in default makes any transfer of the assets and liabilities of such institution; and

(ii) the transfer includes any qualified financial contract,

the conservator or receiver shall use such conservator's or receiver's best efforts to notify any person who is a party to any such contract of such transfer by 12:00, noon (local time) on the business day following such transfer.

(B) Business day defined

For purposes of this paragraph, the term "business day" means any day other than any Saturday, Sunday, or any day on which either the New York Stock Exchange or the Federal Reserve Bank of New York is closed.

(11) Certain security interests not avoidable

No provision of this subsection shall be construed as permitting the avoidance of any legally enforceable or perfected security interest in any of the assets of any depository institution except where such an interest is taken in contemplation of the institution's insolvency or with the intent to hinder, delay, or defraud the institution or the creditors of such institution.

(12) Authority to enforce contracts

(A) In general

The conservator or receiver may enforce any contract, other than a director's or officer's liability insurance contract or a depository institution bond, entered into by the depository institution notwithstanding any provision of the contract providing for termination, default, acceleration, or exercise of rights upon, or solely by reason of, insolvency or the appointment of a conservator or receiver.

(B) Certain rights not affected

No provision of this paragraph may be construed as impairing or affecting any right of the conservator or receiver to enforce or recover under a director's or officer's liability insurance contract or depository institution bond under other applicable law.

(13) Exception for federal reserve and federal home loan banks

No provision of this subsection shall apply with respect to —

(A) any extension of credit from any Federal home loan bank or Federal Reserve bank to any insured depository institution; or

(B) any security interest in the assets of the institution securing any such extension of credit.

(14) Selling credit card accounts receivable

(A) Notification required

An undercapitalized insured depository institution (as defined in section 1831o of this title) shall notify the Corporation in writing before entering into an agreement to sell credit card accounts receivable.

(B) Waiver by Corporation

The Corporation may at any time, in its sole discretion and upon such terms as it may prescribe, waive its right to repudiate an agreement to sell credit card accounts receivable if the Corporation —

(i) determines that the waiver is in the best interests of the deposit insurance fund; and

(ii) provides a written waiver to the selling institution.

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(C) Effect of waiver on successors

(i) In general

If, under subparagraph (B), the Corporation has waived its right to repudiate an agreement to sell credit card accounts receivable —

(I) any provision of the agreement that restricts solicitation of a credit card customer of the selling institution, or the use of a credit card customer list of the institution, shall bind any receiver or conservator of the institution; and

(II) the Corporation shall require any acquirer of the selling institution, or of substantially all of the selling institution's assets or liabilities, to agree to be bound by a provision described in subclause (T) as if the acquirer were the selling institution.

(ii) Exception

Clause (i)(II) does not —

(I) restrict the acquirer's authority to offer any product or service to any person identified

without using a list of the selling institution's customers in violation of the agreement;

(II) require the acquirer to restrict any preexisting relationship between the acquirer and a customer; or

(III) apply to any transaction in which the acquirer acquires only insured deposits.

(D) Waiver not actionable

The Corporation shall not, in any capacity, be liable to any person for damages resulting from the waiver of or failure to waive the Corporation's right under this section to repudiate any contract or lease, including an agreement to sell credit card accounts receivable. No court shall issue any order affecting any such waiver or failure to waive.

(E) Other authority not affected

This paragraph does not limit any other authority of the Corporation to waive the Corporation's right to repudiate an agreement or lease under this section.

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(15) Certain credit card customer lists protected

(A) In general

If any insured depository institution sells credit card accounts receivable under an agreement negotiated at arm's length that provides for the sale of the institution's credit card customer list, the Corporation shall prohibit any party to a transaction with respect to the institution under this section or section 1823 of this title from using the list, except as permitted under the agreement.

(B) Fraudulent transactions excluded

Subparagraph (A) does not limit the Corporation's authority to repudiate any agreement entered into with the intent to hinder, delay, or defraud the institution, the institution's creditors, or the Corporation.

* * *

APPENDIX F — PROPOSED GOLDEN PARACHUTE REGULATION

56 FR 50529-01

PROPOSED RULES

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 359

RIN 3064-AB11

Regulation of Golden Parachutes and Other Benefits Which Are Subject to Misuse

Monday, October 7, 1991

AGENCY: Federal Deposit Insurance Corporation ("FDIC" or "Corporation").

ACTION: Notice of proposed rulemaking.

SUMMARY: The FDIC is proposing a rule limiting golden parachute and indemnification payments to institution-affiliated parties by insured depository institutions, depository institution holding companies and their subsidiaries and affiliates. The purpose of this proposed rule is to prevent the improper disposition of institution assets and to protect the financial soundness of insured depository institutions, depository institution holding companies, their subsidiaries and affiliates, and the federal deposit insurance funds.

DATES: Comments must be received by December 6, 1991.

ADDRESSES: Send comments to Hoyle L. Robinson, Executive Secretary, Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429. Comments maybe

hand-delivered to room 400, 1776 F Street NW., Washington, DC 20429, on business days between 8:30 a.m. and 5 p.m. (FAX number: (202) 898-3838.)

FOR FURTHER INFORMATION CONTACT: Michael D. Jenkins, Examination Specialist, Division of Supervision, (202) 898-6896; Jeffrey M. Kopchik, Counsel, Legal Division, (202) 898-3872; Federal Deposit Insurance Corporation, 550 17th Street NW., Washington, DC 20429.

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

No collections of information pursuant to section 3504(h) of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.) are contained in the proposed rule. Consequently, no information has been submitted to the Office of Management and Budget for review.

Regulatory Flexibility Act

Pursuant to section 605(b) of the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601 et seq.), it is certified that the proposed rule would not have a significant impact on a substantial number of small entities.

Discussion

Section 2523 of the Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990[1] ("Fraud Act")

1. The Comprehensive Thrift and Bank Fraud Prosecution and Taxpayer Recovery Act of 1990 is title XXV of the Crime Control Act of 1990, S. 3266, which was passed by Congress on October 27, 1990 and signed by the President on November 29, 1990.

amended the Federal Deposit Insurance Act ("FDI Act") by adding a new section 18(k). Public Law No. 101-647, section 2523 (1990). This new section 18(k)(1) provides that "[t]he Corporation may prohibit or limit, by regulation or order, any golden parachute payment or indemnification payment." 12 U.S.C. 1828(k)(1). The terms "golden parachute payment" and "indemnification payment" are defined in sections 18(k)(4) and (5)(A) of the FDI Act, respectively. Id. at 1828(k)(4) and (5)(A).

The FDIC has decided to commence a rulemaking proceeding because it is of the opinion that the intent of section 18(k) is best administered by regulation. A regulation will enable insured depository institutions, depository institution holding companies, their subsidiaries and affiliates, and institution-affiliated parties ("IAP's") to enter into lawful compensation and indemnification agreements without inadvertently violating the intent of section 18(k). The Corporation is extremely interested in receiving comments concerning this important regulation. It is especially interested in comments concerning the "bona fide deferred compensation plan or arrangement" exception which is contained in section 18(k) (12 U.S.C. 1828 (k)(4)(C)(ii)) and defined in § 359.1(d) of the proposed regulation.

Background

Although a golden parachute payment can take a variety of forms, generally it is a substantial cash payment which is made to an executive officer of a corporation at the termination of his/her employment. Golden parachute payments originally were used by non-financial services companies to protect executive officers involved in hostile takeovers. However, over the course of the past several years, their use has expanded. Golden

parachutes payments and arrangements have become much more common in the financial services industry than ever before and their use is no longer limited to circumstances involving hostile takeovers. The majority of golden parachute agreements which the FDIC has encountered over the course of the past several years provide for payments upon termination of employment for any reason, except dishonesty or breach of fiduciary duty. The FDIC's concern with regard to such payments is that they may be inappropriate, and represent unsafe and unsound practices in the case of an institution which is experiencing financial difficulties. In the case of an institution which is close to insolvency, a significant golden parachute payment could "push the institution over the edge." Moreover, when an insured institution fails, amounts paid prior to failure pursuant to golden parachute agreements ultimately increase the cost of the failure to the deposit insurance funds.

Indemnification payments are payments which either reimburse officers, directors and employees for legal and other professional expenses incurred in defending themselves in legal proceedings growing out of their affiliation with the institution or pay such expenses "up front." Such payments can be made by the institution directly or pursuant to some form of commercial insurance policy. Although indemnification agreements may represent accepted business practice, the FDIC is concerned that, in certain circumstances, such agreements may undermine the ability of the various financial institution regulatory agencies to enforce federal banking laws and regulations. The deterrent effect of a penalty levied or judgment obtained against an IAP is negated if that penalty or judgment is paid or reimbursed by the institution or its holding company pursuant to an indemnification agreement.

Appendix F

With regard to golden parachute payments, the following are examples of abuses which the FDIC has encountered in actual situations:

(1) A bank was rated a composite "4", had equity capital significantly below the established regulatory minimum and experienced significant losses during its last year of operation with no immediate prospects for improvement. The institution's chief executive officer had held his position with the institution for a significant period of time and was responsible for the policies and practices which led to the institution's financial difficulties. The CEO elected to retire two and one-half years prior to the termination of his existing employment agreement and requested payment of 100% of salary, approximately $1,250,000, plus retirement benefits equal to $300,000 per year. He received a portion of the requested payments. These payments caused a significant dissipation of assets and adversely affected the earnings of the bank.

(2) A savings association was in a "troubled" condition. As part of its plan for correction with the regulator, the institution's board of directors agreed to look for a buyer. The institution's president and cashier requested and received agreements that each of them would be paid $500,000 if the institution were sold.

(3) As a result of an examination, the FDIC concluded that a small, local bank was insolvent and informed the bank's president and board of directors of the finding. The board initially agreed to cooperate with the regulators and allow on-site review of loan files by prospective bidders until the FDIC could arrange for the institution's sale within the next couple of months. Approximately one month after the FDIC informed the

institution that it was insolvent, the institution's president informed the board that he had decided to resign prior to the bank's closure and requested that he be paid for the remainder of the term of his employment agreement in a lump sum. The institution's board of directors agreed, and paid the resigning president approximately $62,000.

These examples are representative of some of the types of abuses which the FDIC has encountered involving golden parachute payments. In each of these cases, institutions which were experiencing severe financial difficulties paid or agreed to pay substantial sums to institution-affiliated parties. These payments were not in the best interests of the institution and, therefore, not in the best interest of the FDIC. They demonstrate the need for limitations on such payments in order to prevent the dissipation of an institution's assets and to protect the deposit insurance funds.

With regard to indemnification payments, the following are examples of abuses which the FDIC has encountered in actual situations:

(1) An institution was rated a composite "5" and scheduled to be placed into conservatorship. Two months prior to commencement of the conservatorship, the institution's board of directors transferred $100,000 of the institution's funds to its holding company which deposited those funds in another institution in order to pay anticipated legal expenses of the institution's senior officers and directors. In addition, the board authorized a $100,000 prepayment to the institution's outside law firm for the same purpose. These payments were made to protect directors from possible lawsuits if the institution closed, and for the defense of actions taken by regulators.

(2) As a result of an FDIC examination, a bank was determined to be insolvent. The FDIC informed the bank's board of directors that the institution would likely be closed within the next several months. Approximately one week after the FDIC's notice, the board made a $100,000 prepayment to cover anticipated legal expenses to the bank's outside law firm. Several weeks later, the bank's president utilized bank funds to purchase a $100,000 certificate of deposit at another financial institution to be used as a "self insurance indemnity trust account." These payments were made to protect directors from possible lawsuits if the bank closed, and for the defense of actions taken by regulators.

These examples are representative of the types of abuses which the FDIC has encountered involving indemnification payments. They demonstrate that limitations on indemnification payments are necessary in order to protect the financial integrity of insured institutions and to preserve the deterrent effect of administrative or civil enforcement actions which result in judgments against institution-affiliated parties.

Prior to the passage of the Fraud Act, the Chairman of the FDIC testified in support of a statutory provision restricting golden parachutes payments on four separate occasions.[2] On one such occasion, the Chairman stated that:

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2. See Testimony of L. William Seidman, Chairman, Federal Deposit Insurance Corporation, before the Banking and Financial Institutions Subcommittee, Committee on Banking, United States House of Representatives, March 14, 1990; Testimony of L. William Seidman, Chairman, Federal Deposit Insurance Corporation, on the Prosecution of Financial Crimes before the Subcommittee on Criminal Justice, Committee on the Judiciary, United States House of Representatives, July 11, 1990; Testimony of L. William Seidman, Chairman, Federal Deposit

(Cont'd)

Appendix F

> The FDIC thinks it unconscionable that directors, officers and others responsible for an insured institution's failure — or near failure — should be able to line their pockets with an insured institution's money at the expense of the Federal deposit insurance funds. Paying golden parachute money to a director, officer, or other responsible party in the case of a failed or failing insured institution amounts essentially to paying that person with a check drawn on the Federal deposit insurance funds.

Testimony of L. William Seidman, Chairman, Federal Deposit Insurance Corporation, Committee on the Judiciary, United States Senate, July 24, 1990.

The legislative history of the Fraud Act indicates that the authority to prohibit or limit golden parachute and indemnification payments was conferred on the FDIC by Congress as part of its effort to provide the Corporation with "additional tools to combat fraud and abuse affecting financial institutions." 136 Cong. Rec. E3684 (daily ed. November 2, 1990) (statement of Rep. Schumer). More specifically, subtitle B of the Fraud Act, where section 2523 appears, "is aimed at protecting assets from wrongful disposition * * *." Id. In

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(Cont'd)

Insurance Corporation, on the Prosecution of Financial Crimes before the Committee on the Judiciary, United States Senate, July 24, 1990; Testimony of L. William Seidman, Chairman, Federal Deposit Insurance Corporation, on the Prosecution of Financial Crimes before the Committee on Banking, Housing and Urban Affairs, United States Senate, August 2, 1990.

supporting this new authority, the FDIC was aware of several recent examples (in addition to those described above) of insured depository institutions which had paid institution-affiliated parties substantial sums upon the termination of their employment despite the fact that each institution was in an unsound condition when the payment was made and that the individual who received the payment was a longstanding member of senior management who caused, was responsible for, or had been in a position to have been able to influence the institution's activities and policies which resulted in its unsatisfactory financial condition.

Thus, it is the FDIC's opinion that golden parachute and indemnification payments, as defined in the Fraud Act, are not appropriate or justified except in the clearly-defined circumstances discussed below.

Enforcement

It is the FDIC's view that enforcement of this proposed regulation will be a matter for the appropriate federal banking agency, although the regulation requires the FDIC's written concurrence in the event that an institution or its holding company requests permission to make a golden parachute payment. In the event that an institution or holding company chooses to make such a request, the FDIC expects that the institution would make simultaneous and identical submissions to its primary regulator and the FDIC so that each agency could properly and promptly evaluate the institution's request. Also, the legislative history of section 18(k) makes clear that this section of the Fraud Act is not intended to limit or restrict the appropriate federal banking agencies from exercising their existing authority to restrict such payments or other unsafe and unsound practices. Id.

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Generally, the proposed regulation prohibits institutions which are insolvent, in conservatorship or receivership, rated "4" or "5", in a troubled condition as defined in the regulations of the appropriate federal banking agency, or which are subject to a proceeding to terminate deposit insurance from making any payment to an institution-affiliated party which is contingent on the termination of that person's affiliation with the institution, except payments of death or disability benefits, payments pursuant to qualified retirement plans and two other exceptions which are described in more detail below. The proposed regulation also prohibits institutions from paying or reimbursing an institution-affiliated party's legal and other professional expenses incurred in administrative or civil proceedings instituted by an appropriate federal banking agency unless certain criteria are satisfied. Under no circumstances does the regulation allow the reimbursement or payment of fines or penalties assessed or judgments or settlements obtained against an institution-affiliated party as a result of such a proceeding.

Exceptions to Golden Parachute Payment Prohibition

The FDIC is proposing three "exceptions" to the prohibition against golden parachute payments.[3] First, § 359.4 of the proposed regulation allows an insured depository institution, depository institution holding company and any subsidiary or affiliate thereof to make a golden parachute payment to an institution-affiliated party who is hired by an institution or holding company with the written consent of the appropriate

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3. More precisely, only one of these is an actual exception in that it permits a payment or agreement which is covered by the statutory language. The other two are definitions of statutory terms which have been developed or refined by the Corporation.

federal banking agency at a time when the institution or holding company satisfies any of the criteria set forth in § 359.1(g)(1)(ii) of the proposed regulation,[4] and whose golden parachute agreement is approved by the FDIC. These criteria are taken from section 18(k). (12 U.S.C 1828(k)(4)(A)(ii)).

The purpose of this exception is to permit a troubled institution or depository institution holding company to attempt to reverse its slide toward economic failure by attracting competent, new management which enjoys the confidence of that institution's primary federal regulator and the FDIC. However, the FDIC is aware that individuals who possess the experience and expertise which qualify them for such a position are highly sought after business persons who, in most circumstances, already have established successful careers with other financial institutions. In order to induce such an individual to leave an established, stable career for a job in a troubled institution which may not survive regardless of that individual's efforts, it is generally necessary to agree to pay that individual some sort of severance payment in the event that the efforts of the individual for the institution are not successful. It is the FDIC's view that, as long as the individual is not guilty of improper conduct while in the troubled institution's employ (as delineated in § 359.2(b) of the proposed regulation), such agreements reflect good business judgment, recognize the realities of the marketplace and may benefit both the institution and the deposit insurance funds.

The second "exception" is contained in § 359.1(g) of the proposed regulation, which defines a "golden parachute

4. These criteria are that the institution or holding company is insolvent, in conservatorship of receivership, troubled, rated "4" or "5", or subject to a proceeding to terminate deposit insurance.

payment." The FDIC recognizes that one important tool in restoring an institution to financial health may be institutional downsizing through personnel reductions in force. In such situations, institutions may choose to employ an existing severance pay plan or adopt a new plan to assist employees whose employment is terminated. In addition, many corporations (in various industries) maintain severance pay plans which pay benefits to employees who lose their jobs through no fault of their own, for reasons such as an overall reduction in force.

It is the FDIC's view that section 18(k) is not intended to discourage financial institutions from making the difficult, but sometimes necessary, decision to reduce expenses by reducing staff and from providing some sort of reasonable and responsible financial assistance to affected employees. The FDIC is also of the opinion that section 18(k) is not intended to invalidate traditional severance benefits for employees who lose their jobs (through no fault of their own) for other reasons. Thus, § 359.1(g)(2)(iv) of the proposed regulation provides that the term "golden parachute payment" does not include any payment made pursuant to a nondiscriminatory severance plan or arrangement which provides for the payment of severance benefits to all eligible employees upon involuntary termination for other than cause. However, the proposal limits the maximum severance benefit that any employee may receive pursuant to such a plan to six months' base salary because in the view of the FDIC, absent such a limitation, the intent of the Fraud Act could be circumvented. In the event that any senior executive officer, as defined in § 303.14(a)(3) of these regulations, is eligible for such severance benefits, the depository institution or holding company must provide 30 days prior written notice to its primary regulator and the FDIC before making such a payment to those individuals.

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The third "exception" to the golden parachute payment prohibition is contained in § 359.1(d) of the proposed regulation which defines "bona fide deferred compensation plan or arrangement." Section 18(k) of the FDI Act explicitly authorizes the FDIC to define, by regulation or order, permissible "bona fide deferred compensation plan[s] or arrngements[s]." (12 U.S.C. 1828(k)(4)(C)(ii)). The FDIC is aware that many corporations, including financial institutions, supplement an employee's retirement benefits through the use of deferred compensation plans. Generally, these plans (which are not qualified under section 401 of the Internal Revenue Code of 1986) are intended to supplement traditional tax qualified defined benefit or defined contribution retirement plans. Such deferred compensation plans are utilized almost exclusively for the benefit of senior executive officers. Although such plans can be structured in numerous ways, they are primarily categorized as "elective", "excess", or "supplemental."

In an elective plan, an institution-affiliated party voluntarily elects to defer compensation which he/she could receive when it is earned. These deferred funds are maintained in a trust account which the institution-affiliated party can access when he/she leaves the institution. In view of the fact that the institution-affiliated party earns these funds at the time the work is performed, has the option of receiving payment at that time and pays income taxes on such earnings at that time, the FDIC is of the opinion that the receipt of such funds at a later time (when the institution otherwise is subject to any of the criteria of § 359.1(g)(1)(ii) of the proposed regulation) would not be a prohibited golden parachute payment.

Excess plans are maintained by an employer solely for the purpose of providing benefits for certain employees in excess

of the limitations on contributions and benefits imposed by section 415 of the Internal Revenue Code of 1986. (Thus, they are often referred to as "piggyback" plans.) In an excess plan, the institution-affiliated party does not have the option of taking the deferred compensation while still employed by the institution. The deferred compensation is received only when the institution-affiliated party leaves the institution or retires. Such plans generally are unfunded and, thus, exempt from the requirements imposed by the Employee Retirement Income Security Act of 1974 ("ERISA"). If such a plan is funded, a trust generally is used and the plan would not be exempt from ERISA's reporting, disclosure and fiduciary rules. The use of such plans to attract and retain qualified executives is common in the financial services industry and other businesses. The FDIC is aware that undue restrictions on these plans could be disadvantageous to the financial services industry and contrary to the intent of Congress in enacting the Fraud Act. However, the Corporation is also concerned that such plans could be utilized to circumvent the intent of section 18(k) of the FDI Act. Thus, the proposed regulation permits payments pursuant to these excess plans as long as the plan is funded, was in effect at least one year prior to the occurrence of any of the events described in § 359.1(g)(1)(ii) of the proposed regulation and the institution-affiliated party is vested under the terms of such a plan. The FDIC is of the opinion that application of these factors is the best way to distinguish between a permissible bona fide deferred compensation plan as intended by Congress and an impermissible attempt to circumvent the restriction on golden parachute payments.

Supplemental (or "top-hat") plans are maintained by an employer primarily for the purpose of providing deferred compensation for a select group of management or highly

compensated employees. It is the FDIC's understanding that supplemental plans are not funded because funding would render them subject to all the requirements imposed by title I of ERISA. Instead, benefits are paid from the general assets of the corporation. As such, these assets are also available to the corporation's creditors in the event that the corporation becomes insolvent. Because these plans are not funded, they are essentially a promise to pay a sum of money at some time in the future when the IAP leaves the institution. As such, supplemental plans are indistinguishable from a prohibited golden parachute payment, and thus do not fall within the exception for bona fide deferred compensation plans or arrangements.

The proposed regulation does not permit institutions, holding companies and institution-affiliated parties to continue to contribute to such excess and supplemental plans upon the occurrence of any of the events delineated in § 359.1(g)(ii) of the proposed regulation. At that point in time, further contributions would be prohibited. However, the institution-affiliated party would have the right to receive funds which were lawfully contributed prior to the institution's troubled condition.

Additional Exceptions and Factors Considered

Section 18(k)(2) of the FDI Act provides that the FDIC "shall prescribe, by regulation, the factors to be considered by the Corporation in taking any action pursuant to paragraph (1) [its authority to prohibit or limit golden parachute payments and indemnification payments]." The section also sets forth a number of illustrative factors that should be considered. The Corporation has carefully considered these factors in arriving at the conclusion that golden parachute payments generally should be prohibited, except in the narrow circumstances

delineated in § 359.4 of the proposed regulation. However, § 359.2(b) of the proposed regulation also sets forth a procedure to allow an institution which desires to make a payment or enter into an agreement which it determines should not be prohibited, but which is not clearly covered by any of the express "exceptions" to the prohibition, to solicit appropriate regulatory approvals. In so doing, the institution will be required to address certain of the factors enumerated in section 18(k), and the appropriate federal banking agency and the Corporation may consider the remaining factors and any other circumstances which bear on the issue of whether the proposed payment would be contrary to the intent of the prohibition. It is the Corporation's expectation that such approvals would be granted infrequently.

Indemnification Payments

Section 18(k) also authorizes the FDIC to prohibit or limit indemnification payments. An "indemnification payment" is defined as payment by an insured depository institution or depository institution holding company for the benefit of an IAP in order to pay or reimburse such person for any liability or legal expense sustained with regard to an administrative or civil enforcement action which results in a final order against the IAP. (12 U.S.C. 1828(k)(5)). The legislative history of the Fraud Act makes it clear that this section is intended (i) to preserve the deterrent effects of administrative enforcement or civil actions by insuring that institution-affiliated parties who are found to have violated the law, engaged in unsafe or unsound banking practices or breached any fiduciary duty to the institution, pay any civil money penalties and associated legal expenses out of their own pockets without reimbursement from the institution or its holding company and (ii) to safeguard the assets of financial institutions by prohibiting the expenditure of

funds to defend, pay penalties imposed on or reimburse institution-affiliated parties who have been found to have violated the law. 136 Cong. Rec. E3687 (daily ed. November 2, 1990) (statement of Rep. Schumer).

The difficulty in enforcing such a prohibition, however, is that the parties involved do not know whether the proceeding will result in a final order against the institution-affiliated party until the proceeding has been concluded. Pending such conclusion, legal and other professional costs incurred in defending such an action can be substantial and impose significant hardships upon institution-affiliated parties who do not possess the financial resources to absorb such expenses. In recognition of this concern, the Office of the Comptroller of the Currency has issued a staff opinion which describes guidelines that permit national banks under certain circumstances to pay or reimburse an officer, director or employee for legal expenses incurred in defending against a civil action instituted by the Comptroller prior to the entry of a final order in the IAP's favor. OCC Investment Securities Letter No. 43 (July 1990). Section 8.53 of the Model Business Corporation Act also contains suggested provisions which address director and officer indemnification similar to the OCC's guidelines.

The FDIC is of the opinion that it would be inconsistent with the intent of the Fraud Act categorically to prohibit insured depository institutions and holding companies from advancing funds to pay or reimburse IAP's for reasonable legal or other professional expenses incurred in defending against an administrative or civil action brought by the appropriate federal banking agency prior to the entry of a final order. Therefore, § 359.5 of the proposed regulation sets forth the circumstances under which such indemnification payments may be made. The

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FDIC is of the opinion that six criteria must be satisfied in order to permit an institution to make or agree to make any indemnification payment to or for the benefit of any IAP prior to the entry of a final order in the IAP's favor. First, the institution's board of directors, in good faith, must certify in writing that the IAP has a substantial likelihood of prevailing on the merits in the proceeding. In the FDIC's view, it would be inconsistent with the intent of section 18(k) to allow an institution's board of directors to authorize indemnification of an institution-affiliated party if, after examining the relevant facts and information, the directors conclude that the IAP does not have a substantial likelihood of prevailing on the merits. Second, the board must determine in writing that the indemnification payments will not adversely affect the institution's safety and soundness. It is well-established that a board of directors' primary duty is to the financial institution itself and that its financial soundness cannot be jeopardized to benefit any director, officer or employee. Third, the board of directors is obligated to cease making or authorizing indemnification payments in the event that it believes, or reasonably should believe, that the first two conditions discussed above are no longer being met. This condition imposes a duty on the institution's board actively to monitor the situation. If, for example, the board becomes aware of facts (previously unknown to it) which establish that the IAP knowingly and unambiguously violated an applicable statute or regulation, it could no longer reasonably believe that the IAP has a substantial likelihood of prevailing on the merits, and should terminate indemnification payments. To fail to do so would be a violation of the regulation. The FDIC believes that the imposition of such an obligation is reasonable and consistent with the intent of the Fraud Act and a board's responsibility to the institution it serves. The fourth condition makes clear that any indemnification payment authorized by the institution's

board of directors is limited to the payment or reimbursement of legal or other professional expenses incurred in connection with an IAP's involvement in any administrative proceeding or civil action instituted by the appropriate federal banking agency and shall not include payment or reimbursement for the amount of, or any cost incurred in connection with, any settlement of the proceeding or any judgment or penalty imposed with respect to any proceeding. This condition is intended to clarify that under no circumstances may indemnification payments be used to pay, directly or indirectly, the amount of any settlement of a proceeding or any penalty or judgment imposed on or obtained against the IAP. Fifth, the IAP must agree in writing to reimburse the institution for an indemnification if he/she does not prevail on the merits. In the Corporation's view, such a commitment represents an equitable arrangement. The IAP obtains the benefit of indemnification made in advance, but the institution can recover payments made pursuant to such indemnification agreements if it is ultimately determined that the IAP acted improperly. Sixth, the insured depository institution or depository institution holding company must provide the appropriate federal banking agency and the FDIC with prior written notice of its board's authorization of such indemnification.

The definition of "indemnification payment" in section 359.1(h) of the proposed regulation includes (i) payments made by an institution to an institution-affiliated party to reimburse him/her for expenses already incurred and paid, (ii) payments made on behalf of an institution-affiliated party by the institution directly to a law firm or other professional organization which is providing professional services to the IAP in connection with the defense of an administrative or civil action and (iii) payments made by the institution to purchase commercial insurance or

fidelity bond coverage which will pay or reimburse the IAP for such expenses.[5] It also should be noted that the definition of indemnification payment does not include, and therefore the regulation does not prohibit, payments made pursuant to insurance coverage purchased directly by the IAP at his/her own expense.

Other Issues

The FDIC also would like to clarify several other points concerning the scope of the proposed regulation. First, the proposed regulation will affect existing agreements between institutions and institution-affiliated parties to pay golden parachute and indemnification payments in the future. For example, a healthy institution which enters into a permissible golden parachute agreement and subsequently meets any of the criteria of § 359.1(g)(1)(ii) of the proposed regulation, would no longer be permitted to make a golden parachute payment pursuant to that agreement so long as it continues to meet any of these criteria. Second, the FDIC will consider any payment of unearned wages pursuant to an employment contract which is terminated prior to its stated termination date (e.g., payment of an institution-affiliated party's salary for the final year of an employment contract which is terminated with one year remaining) to be a prohibited golden parachute payment, if the circumstances in § 359.1(g)(1)(ii) of the proposed regulation

5. In the event that the IAP is required to provide reimbursement and his/her legal expenses have been paid pursuant to a commercial insurance policy or fidelity bond purchased by the institution or its holding company, the IAP shall reimburse the institution or its holding company for that portion of the cost of the policy or bond attributable to the IAP's defense in the administrative or civil action. The FDIC anticipates that this information should be available to the institution from the insurer.

are present when the payment is made. Third, the FDIC and the other federal banking agencies will examine very closely any attempt by an institution or holding company to circumvent the proposed regulation by continuing to employ the IAP in some other capacity (e.g., as a "consultant") subsequent to the payment of what otherwise would clearly be a prohibited golden parachute payment.

Request for Public Comment

The FDIC hereby requests comment on all aspects of the proposed rule, including both legal and policy considerations. In particular, with respect to both the golden parachute and indemnification limitations, we request comments on whether the regulation appropriately balances the protection of the insurance funds with the needs of insured depository institutions and depository institution holding companies to attract and retain qualified directors and management. Further, we request comments on the overall public benefit and cost-effectiveness of the proposed restrictions concerning indemnification and the permissible scope or director's and officer's liability insurance, taking into account the cost and availability of such insurance to insured depository institutions and their holding companies. Interested persons are invited to submit comments during a 60-day comment period.

List of Subjects in 12 CFR Part 359

Banks, banking; Golden parachute payments; Indemnification payments.

For the reasons set out in the preamble, the FDIC hereby proposes to add part 359 to title 12, chapter III, subchapter B, of the Code of Federal Regulations to read as follows:

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PART 359 — GOLDEN PARACHUTE AND INDEMNIFICATION PAYMENTS

359.1 Definitions
359.2 Golden parachute payments prohibited
359.3 Indemnification payments prohibited
359.4 Permissible golden parachute payments
359.5 Permissible indemnification payments

Authority: 12 U.S.C. 1828(k).

§ 359.1 Definitions.

(a) Act means the Federal Deposit Insurance Act, as amended (12 U.S.C. 1811, et seq.).

(b) Appropriate federal banking agency means:

(1) The Comptroller of the Currency, in the case of any national banking association, any District bank, or any Federal branch or agency of a foreign bank and its subsidiaries;

(2) The Board of Governors of the Federal Reserve System, in the case of —

(i) Any State member insured bank (except a District bank) and its subsidiaries; and

(ii) Any bank holding company and any subsidiary of a bank holding company (other than a bank or a subsidiary of a bank);

(3) The Federal Deposit Insurance Corporation in the case of a State nonmember insured bank (except a District bank), or a foreign bank having an insured branch and its subsidiaries; and

(4) The Director of the Office of Thrift Supervision in the case of any savings association or any savings and loan holding company.

(c) Bank holding company has the meaning given to such term in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841 et seq.).

(d) Bona fide deferred compensation plan or arrangement means any plan, contract, agreement or other arrangement whereby:

(1) An institution-affiliated party voluntarily elects to defer (by reducing wages paid) until the termination of such party's employment, a portion of the reasonable compensation for services rendered which otherwise would have been paid to such party at the time the services were rendered; or

(2) An insured depository institution or depository institution holding company establishes a nonqualified deferred compensation plan:

(i) Solely for the purpose of providing benefits for certain employees in excess of the limitations on contributions and benefits imposed by section 415 of the Internal Revenue Code of 1986 (26 U.S.C. 415); or

(ii) Primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees; Provided, however, that such plan was in effect at least one year prior to any of the events described in paragraph (g)(1)(ii) of this section, the institution-affiliated party is vested in such plan at the time of termination of employment and such plan is funded by the institution or holding company. For purposes of this paragraph (d)(2), a plan is funded if specific assets are segregated or otherwise set aside so that such assets are not available to the institution or holding company for any purpose other than distribution to the participating employee(s) and are not available to satisfy claims of the institution's or holding company's creditors.

(e) Corporation means the Federal Deposit Insurance Corporation.

(f) Depository institution holding company means a bank holding company or a savings and loan holding company, or a..y direct or indirect subsidiary thereof, other than an insured depository institution.

(g) Golden parachute payment. (1) The term golden parachute payment means any payment (or any agreement to make any payment) by any insured depository institution or depository institution holding company for the benefit of any person who is or was an institution-affiliated party pursuant to an obligation of such institution or holding company that:

(i) Is contingent on or payable on or after the termination of such party's primary employment or affiliation with the institution or holding company; and

(ii) Is received on or after, or is made in contemplation of, any of the following events:

(A) The insolvency of the insured depository institution or depository institution holding company, or any insured depository institution subsidiary of such holding company; or

(B) The appointment of any conservator or receiver for such insured depository institution; or

(C) A determination by the insured depository institution's or depository institution holding company's appropriate federal banking agency, respectively, that the insured depository institution or depository institution holding company is in a troubled condition, as defined in the applicable regulations of the appropriate federal banking agency (§ 303.14(a)(4) of this chapter); or

(D) The insured depository institution is assigned a composite rating of 4 or 5 by the appropriate federal banking agency or informed in writing by the Corporation that it is rated a 4 or 5 under the Uniform Financial Institutions Rating System of the Federal Financial Institutions Examination Council; or

(E) The Corporation initiates a proceeding against the insured depository institution to terminate or suspend deposit insurance for such institution.

(2) Exceptions. The term golden parachute payment shall not include:

(i) Any payment made pursuant to a retirement plan which is qualified (or is intended within a reasonable period of time to be qualified) under section 401 of the Internal Revenue Code of 1986 (26 U.S.C. 401) or other nondiscriminatory benefit plan; or

(ii) Any payment made pursuant to a bona fide deferred compensation plan or arrangement as defined in paragraph (d) of this section or which the Corporation determines by order to be permissible; or

(iii) Any payment made by reason of the death or disability of an institution-affiliated party; or

(iv) Any payment made pursuant to a nondiscriminatory severance pay plan or arrangement which provides for payment of severance benefits to all eligible employees upon involuntary termination other than for cause; provided, however, that no employee shall receive any such payment which exceeds the base compensation paid to such employee during the six months immediately preceding termination of employment, the institution may prescribe reasonable eligibility requirements applicable to all employees such as a minimum length of service

requirement, and such severance pay plan or arrangement shall not have been modified to increase the amount or scope of severance benefits at a time when the insured depository institution or depository institution holding company was in a condition specified in paragraph (g)(1)(ii) of this section or in contemplation of such a condition; provided further, however, that no such payment shall be made to any senior executive officer (as defined in § 303.14(a)(3) of this chapter) of any insured depository institution or depository institution holding company without providing 30 days prior written notice to the appropriate federal banking agency and the FDIC.

(h) Indemnification payment. (1) The term indemnification payment means any payment (or any agreement or arrangement, pursuant to any charter or bylaw provision, to make any payment) by any insured depository institution or depository institution holding company for the benefit of any person who is or was an institution-affiliated party, to pay or reimburse such person for any liability or legal expense with regard to any administrative proceeding or civil action instituted by any federal or state banking agency which results in a final order pursuant to which such person:

(i) Is assessed a civil money penalty;

(ii) Is removed from office or prohibited from participating in the conduct of the affairs of the insured depository institution; or

(iii) Is required to cease and desist from or take any affirmative action described in section 8(b) of the Act with respect to such institution.

(2) Exception. The term indemnification payment shall not include any payment by an insured depository institution or depository institution holding company which is used to purchase any commercial insurance policy or fidelity bond, except that such insurance policy or bond shall not be used to make any prohibited indemnification payment other than reimbursement to the insured depository institution or depository institution holding company as required under a formal order described in paragraph (h)(1)(iii) of this section.

(i) Insured depository institution means any bank or savings association the deposits of which are insured by the Corporation pursuant to the Act, or any subsidiary thereof.

(j) Institution-affiliated party means:

(1) Any director, officer, employee, or controlling stockholder (other than a depository institution holding company) of, or agent for, an insured depository institution or depository institution holding company;

(2) Any other person who has filed or is required to file a change-in-control notice with the appropriate federal banking agency under section 7(j) of the Act (12 U.S.C. 1817(j)) in respect of an insured depository institution or depository institution holding company;

(3) Any shareholder (other than a depository institution holding company), consultant, joint venture partner, and any other person as determined by the appropriate federal banking agency (by regulation or case-by-case) who participates in the conduct of the affairs of an insured depository institution or depository institution holding company; and

(4) Any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in: Any violation of any law or regulation, any breach of fiduciary duty, or any unsafe or unsound practice, which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution or depository institution holding company.

(k) Liability or legal expense means:

(1) Any legal or other professional fees and expenses incurred in connection with any claim, proceeding, or action;

(2) The amount of, and any cost incurred in connection with, any settlement of any claim, proceeding, or action; and

(3) The amount of, and any cost incurred in connection with, any judgment or penalty imposed with respect to any claim, proceeding, or action.

(l) Payment means:

(1) Any direct or indirect transfer of any funds or any asset;

(2) Any forgiveness of any debt or other obligation; and

(3) Any segregation of any funds or assets, the establishment or funding of any trust or the purchase

of or arrangement for any letter of credit or other instrument, for the purpose of making, or pursuant to any agreement to make, any payment on or after the date on which such funds or assets are segregated, or at the time of or after such trust is established or letter of credit or other instrument is made available, without regard to whether the obligation to make such payment is contingent on:

(i) The determination, after such date, of the liability for the payment of such amount; or

(ii) The liquidation, after such date, of the amount of such payment.

(m) Savings and loan holding company has the meaning given to such term in section 10 of the Home Owners' Loan Act (12 U.S.C. 1461 et seq.)

§ 359.2 Golden parachute payments prohibited.

(a) No insured depository institution or depository institution holding company shall make or agree to make any golden parachute payment, except as provided in paragraphs (b) and (d) of this section and § 359.4 of this part.

(b) Notwithstanding paragraph (a) of this section, an insured depository institution or depository institution holding company may make or agree to make a golden parachute payment if, and to the extent that, the appropriate federal banking agency, with the written concurrence of the Corporation, determines that such a payment or agreement is permissible.

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An insured depository institution or depository institution holding company seeking such a determination shall demonstrate that:

(1) There is no reasonable basis to believe, at the time such payment is proposed to be made, that the institution-affiliated party has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the depository institution or depository institution holding company that has had or is likely to have a material adverse effect on the institution or holding company;

(2) There is no reasonable basis to believe, at the time such payment is proposed to be made, that the institution-affiliated party is substantially responsible for the insolvency of the insured depository institution, depository institution holding company or any insured depository institution subsidiary of such holding company, the appointment of a conservator or receiver for the depository institution or any insured depository institution subsidiary of the insured depository institution holding company, or the troubled condition of the insured depository institution, insured depository institution holding company or any insured depository institution subsidiary of such holding company, as defined in the applicable regulations of the appropriate federal banking agency;

(3) There is no reasonable basis to believe, at the time such payment is proposed to be made, that the institution-affiliated party has materially violated any applicable Federal or State banking law or regulation

that has had or is likely to have a material effect on the insured depository institution or depository institution holding company; and

(4) There is no reasonable basis to believe, at the time such payment is proposed to be made, that the institution-affiliated party has violated or conspired to violate section 215, 656, 657, 1005, 1006, 1007, 1014, 1032, or 1344 of title 18 of the United States Code, or section 1341 or 1343 of such title affecting a federally insured financial institution as defined in title 18 of the United States Code.

(c) In making a determination under paragraph (b) of this section, the appropriate federal banking agency and the Corporation may consider:

(1) Whether, and to what degree, the institution affiliated party was in a position of managerial or fiduciary responsibility;

(2) The length of time the institution-affiliated party was affiliated with the insured depository institution or depository institution holding company, and the degree to which the proposed payment represents a reasonable payment for services rendered over the period of employment; and

(3) Any other factors or circumstances which would indicate that the proposed payment would be contrary to the intent of section 18(k) of the Act or this part.

(d) Notwithstanding paragraphs (a) and (b) of this section, a depository institution holding company that is a diversified holding company as defined in section 10(a)(1)(F) of the Home Owner's Loan Act (12 U.S.C. 1461 et seq.) may make a golden parachute payment if, and to the extent that, such depository institution holding company determines and can demonstrate that:

(1) The conditions delineated in paragraphs (b)(1), (2), (3) and (4) of this section have been satisfied; and

(2) The institution-affiliated party falls within the definition of "institution-affiliated party" solely because such person is a director, officer, employee or controlling stockholder of a diversified holding company.

§ 359.3 Indemnification payments prohibited.

No insured depository institution or depository institution holding company shall make or agree to make any indemnification payment, except as provided in § 359.5 of this part.

§ 359.4 Permissible golden parachute payments.

An insured depository institution or depository institution holding company may agree to make a golden parachute payment if:

(a) Such an agreement is made with respect to an institution-affiliated party who was hired by an

insured depository institution or depository institution holding company at a time when that institution or holding company satisfied any of the criteria set forth in § 359.1(g)(1)(ii) of this part and the institution's appropriate federal banking agency and the Corporation consented in writing to the amount and terms of the golden parachute payment; and

(b) At the time the payment is made, the factors delineated in § 359.2(b)(1), (2), (3), or (4) of this part have been satisfied, and the factors delineated in § 359.2(c)(3) of this part are not present.

§ 359.5 Permissible indemnification payments.

(a) An insured depository institution or depository institution holding company may make or agree to make reasonable indemnification payments to an institution-affiliated party if:

(1) The institution's or holding company's board of directors, in good faith, determines in writing that the institution-affiliated party has a substantial likelihood of prevailing on the merits;

(2) The institution's or holding company's board of directors, in good faith, determines in writing that the payment of such expenses will not adversely affect the institution's safety and soundness;

(3) At any time the institution's or holding company's board of directors believes, or should reasonably believe, that the conditions of paragraphs

(a)(1) and (2) of this section are no longer being met, it ceases making or authorizing such payments;

(4) The indemnification payments are limited to the payment or reimbursement of reasonable legal or other professional expenses incurred in connection with an institution-affiliated party's involvement in an administrative proceeding or civil action instituted by the appropriate federal banking agency; but in no event shall such indemnification pay or reimburse an institution-affiliated party for the amount of, or any cost incurred in connection with, any settlement of any such claim, proceeding or action or any judgment or penalty imposed with respect to any such claim, proceeding or action;

(5) The institution-affiliated party agrees in writing to reimburse the institution for such indemnification payments in the event that the proceeding results in a final order under which the institution-affiliated party:

(i) Is assessed a civil money penalty;

(ii) Is removed from office or prohibited from participating in the conduct of the affairs of the insured depository institution; or

(iii) Is required to cease and desist from or take any affirmative action described in section 8(b) of the Act with respect to such institution; and

(6) The institution or holding company provides the appropriate federal banking agency and the FDIC with prior written notice of its board of directors' authorization of such indemnification.

(b) An institution-affiliated party requesting indemnification payments shall not participate in any way in the board's discussion and approval of such payments; provided, however, that such institution-affiliated party may present his/her request to the board and respond to any inquiries from the board concerning his/her involvement in the circumstances giving rise to the administrative proceeding or civil action.

By order of the Board of Directors, dated at Washington, DC, this 24th day of September, 1991.

Federal Deposit Insurance Corporation.

Robert E. Feldman,

Deputy Executive Secretary.

APPENDIX G — GOLDEN PARACHUTE REGULATION

12 C.F.R. § 359.0

CODE OF FEDERAL REGULATIONS
TITLE 12 — BANKS AND BANKING
CHAPTER III — FEDERAL DEPOSIT INSURANCE CORPORATION
SUBCHAPTER B — REGULATIONS AND STATEMENTS OF GENERAL POLICY
PART 359 — GOLDEN PARACHUTE AND INDEMNIFICATION PAYMENTS

Titles 1-50 current through March 22, 1996; 61 FR 12014

§ 359.0 Scope.

(a) This part limits and/or prohibits, in certain circumstances, the ability of insured depository institutions, their subsidiaries and affiliated depository institution holding companies to enter into contracts to pay and to make golden parachute and indemnification payments to institution-affiliated parties (IAPs).

(b) The limitations on golden parachute payments apply to troubled insured depository institutions which seek to enter into contracts to pay or to make golden parachute payments to their IAPs. The limitations also apply to depository institution holding companies which are troubled and seek to enter into contracts to pay or to make golden parachute payments to their IAPs as well as healthy holding companies which seek to enter into contracts to pay or to make golden parachute payments to IAPs of a troubled insured depository institution subsidiary. A "golden parachute payment" is generally considered to be any payment to an IAP which is contingent on the termination of that person's employment and is received when the insured

depository institution making the payment is troubled or, if the payment is being made by an affiliated holding company, either the holding company itself or the insured depository institution employing the IAP, is troubled. The definition of golden parachute payment does not include payments pursuant to qualified retirement plans, nonqualified bona fide deferred compensation plans, nondiscriminatory severance pay plans, other types of common benefit plans, state statutes and death benefits. Certain limited exceptions to the golden parachute payment prohibition are provided for in cases involving the hiring of a white knight and unassisted changes in control. A procedure is also set forth whereby an institution or IAP can request permission to make what would otherwise be a prohibited golden parachute payment.

(c) The limitations on indemnification payments apply to all insured depository institutions, their subsidiaries and affiliated depository institution holding companies regardless of their financial health. Generally, this part prohibits insured depository institutions, their subsidiaries and affiliated holding companies from indemnifying an IAP for that portion of the costs sustained with regard to an administrative or civil enforcement action commenced by any federal banking agency which results in a final order or settlement pursuant to which the IAP is assessed a civil money penalty, removed from office, prohibited from participating in the affairs of an insured depository institution or required to cease and desist from or take an affirmative action described in section 8(b) (12 U.S.C. 1818(b)) of the Federal Deposit Insurance Act (FDI Act). However, there are exceptions to this general prohibition. First, an institution or holding company may purchase commercial insurance to cover such expenses, except judgments and penalties. Second, the institution or holding company may

advance legal and other professional expenses to an IAP directly (except for judgments and penalties) if its board of directors makes certain specific findings and the IAP agrees in writing to reimburse the institution if it is ultimately determined that the IAP violated a law, regulation or other fiduciary duty.

* * *

12 C.F.R. § 359.1

CODE OF FEDERAL REGULATIONS
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SUBCHAPTER B — REGULATIONS AND STATEMENTS OF GENERAL POLICY
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Titles 1-50 current through March 22, 1996; 61 FR 12014

§ 359.1 Definitions.

(a) Act means the Federal Deposit Insurance Act, as amended (12 U.S.C. 1811, et seq.).

(b) Appropriate federal banking agency, bank holding company, depository institution holding company and savings and loan holding company have the meanings given to such terms in section 3 of the Act.

(c) Benefit plan means any plan, contract, agreement or other arrangement which is an "employee welfare benefit plan" as that term is defined in section 3(1) of the Employee

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Retirement Income Security Act of 1974, as amended (29 U.S.C. 1002(1)), or other usual and customary plans such as dependent care, tuition reimbursement, group legal services or cafeteria plans; provided however, that such term shall not include any plan intended to be subject to paragraphs (f)(2)(iii) and (v) of this section.

(d) Bona fide deferred compensation plan or arrangement means any plan, contract, agreement or other arrangement whereby:

(1) An IAP voluntarily elects to defer all or a portion of the reasonable compensation, wages or fees paid for services rendered which otherwise would have been paid to such party at the time the services were rendered (including a plan that provides for the crediting of a reasonable investment return on such elective deferrals) and the insured depository institution or depository institution holding company either:

(i) Recognizes compensation expense and accrues a liability for the benefit payments according to generally accepted accounting principles (GAAP); or

(ii) Segregates or otherwise sets aside assets in a trust which may only be used to pay plan and other benefits, except that the assets of such trust may be available to satisfy claims of the institution's or holding company's creditors in the case of insolvency; or

(2) An insured depository institution or depository institution holding company establishes a nonqualified deferred compensation or supplemental retirement plan, other than an elective deferral plan described in paragraph (e)(1) of this section:

(i) Primarily for the purpose of providing benefits for certain IAPs in excess of the limitations on contributions and benefits imposed by sections 415, 401(a)(17), 402(g) or any other applicable provision of the Internal Revenue Code of 1986 (26 U.S.C. 415, 401(a)(17), 402(g)); or

(ii) Primarily for the purpose of providing supplemental retirement benefits or other deferred compensation for a select group of directors, management or highly compensated employees (excluding severance payments described in paragraph (f)(2)(v) of this section and permissible golden parachute payments described in § 359.4); and

(3) In the case of any nonqualified deferred compensation or supplemental retirement plans as described in paragraphs (d)(1) and (2) of this section, the following requirements shall apply:

(i) The plan was in effect at least one year prior to any of the events described in paragraph (f)(1)(ii) of this section;

(ii) Any payment made pursuant to such

plan is made in accordance with the terms of the plan as in effect no later than one year prior to any of the events described in paragraph (f)(1)(ii) of this section and in accordance with any amendments to such plan during such one year period that do not increase the benefits payable thereunder;

(iii) The IAP has a vested right, as defined under the applicable plan document, at the time of termination of employment to payments under such plan;

(iv) Benefits under such plan are accrued each period only for current or prior service rendered to the employer (except that an allowance may be made for service with a predecessor employer);

(v) Any payment made pursuant to such plan is not based on any discretionary acceleration of vesting or accrual of benefits which occurs at any time later than one year prior to any of the events described in paragraph (f)(1)(ii) of this section;

(vi) The insured depository institution or depository institution holding company has previously recognized compensation expense and accrued a liability for the benefit payments according to GAAP or segregated or otherwise set aside assets in a trust which may only be used to pay plan benefits, except that the assets

of such trust may be available to satisfy claims of the institution's or holding company's creditors in the case of insolvency; and

(vii) Payments pursuant to such plans shall not be in excess of the accrued liability computed in accordance with GAAP.

(e) Corporation means the Federal Deposit Insurance Corporation, in its corporate capacity.

(f) Golden parachute payment.

(1) The term golden parachute payment means any payment (or any agreement to make any payment) in the nature of compensation by any insured depository institution or an affiliated depository institution holding company for the benefit of any current or former IAP pursuant to an obligation of such institution or holding company that:

(i) Is contingent on, or by its terms is payable on or after, the termination of such party's primary employment or affiliation with the institution or holding company; and

(ii) Is received on or after, or is made in contemplation of, any of the following events:

(A) The insolvency (or similar event) of the insured depository institution which is making the payment or bankruptcy or insolvency

(or similar event) of the depository institution holding company which is making the payment; or

(B) The appointment of any conservator or receiver for such insured depository institution; or

(C) A determination by the insured depository institution's or depository institution holding company's appropriate federal banking agency, respectively, that the insured depository institution or depository institution holding company is in a troubled condition, as defined in the applicable regulations of the appropriate federal banking agency (§ 303.14(a)(4) of this chapter); or

(D) The insured depository institution is assigned a composite rating of 4 or 5 by the appropriate federal banking agency or informed in writing by the Corporation that it is rated a 4 or 5 under the Uniform Financial Institutions Rating System of the Federal Financial Institutions Examination Council, or the depository institution holding company is assigned a composite rating of 4 or 5 or unsatisfactory by

its appropriate federal banking agency; or

(E) The insured depository institution is subject to a proceeding to terminate or suspend deposit insurance for such institution; and

(iii)(A) Is payable to an IAP whose employment by or affiliation with an insured depository institution is terminated at a time when the insured depository institution by which the IAP is employed or with which the IAP is affiliated satisfies any of the conditions enumerated in paragraphs (f)(1)(ii)(A) through (E) of this section, or in contemplation of any of these conditions; or

(B) Is payable to an IAP whose employment by or affiliation with an insured depository institution holding company is terminated at a time when the insured depository institution holding company by which the IAP is employed or with which the IAP is affiliated satisfies any of the conditions enumerated in paragraphs (f)(1)(ii)(A), (C) or (D) of this section, or in contemplation of any of these conditions.

(2) Exceptions. The term golden parachute payment shall not include:

(i) Any payment made pursuant to a pension or retirement plan which is qualified (or is intended within a reasonable period of time to be qualified) under section 401 of the Internal Revenue Code of 1986 (26 U.S.C. 401) or pursuant to a pension or other retirement plan which is governed by the laws of any foreign country; or

(ii) Any payment made pursuant to a benefit plan as that term is defined in paragraph (c) of this section; or

(iii) Any payment made pursuant to a bona fide deferred compensation plan or arrangement as defined in paragraph (d) of this section; or

(iv) Any payment made by reason of death or by reason of termination caused by the disability of an institution-affiliated party; or

(v) Any payment made pursuant to a nondiscriminatory severance pay plan or arrangement which provides for payment of severance benefits to all eligible employees upon involuntary termination other than for cause, voluntary resignation, or early retirement; provided, however, that no employee shall receive any such payment which exceeds the base compensation paid to such employee during the twelve months (or

such longer period or greater benefit as the Corporation shall consent to) immediately preceding termination of employment, resignation or early retirement, and such severance pay plan or arrangement shall not have been adopted or modified to increase the amount or scope of severance benefits at a time when the insured depository institution or depository institution holding company was in a condition specified in paragraph (f)(1)(ii) of this section or in contemplation of such a condition without the prior written consent of the appropriate federal banking agency; or

(vi) Any severance or similar payment which is required to be made pursuant to a state statute or foreign law which is applicable to all employers within the appropriate jurisdiction (with the exception of employers that may be exempt due to their small number of employees or other similar criteria); or

(vii) Any other payment which the Corporation determines to be permissible in accordance with § 359.4.

(g) Insured depository institution means any bank or savings association the deposits of which are insured by the Corporation pursuant to the Act, or any subsidiary thereof.

(h) Institution-affiliated party (IAP) means:

(1) Any director, officer, employee, or controlling

stockholder (other than a depository institution holding company) of, or agent for, an insured depository institution or depository institution holding company;

(2) Any other person who has filed or is required to file a change-in-control notice with the appropriate federal banking agency under section 7(j) of the Act (12 U.S.C. 1817(j));

(3) Any shareholder (other than a depository institution holding company), consultant, joint venture partner, and any other person as determined by the appropriate federal banking agency (by regulation or case-by-case) who participates in the conduct of the affairs of an insured depository institution or depository institution holding company; and

(4) Any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in: Any violation of any law or regulation, any breach of fiduciary duty, or any unsafe or unsound practice, which caused or is likely to cause more than a minimal financial loss to, or a significant adverse effect on, the insured depository institution or depository institution holding company.

(i) Liability or legal expense means:

(1) Any legal or other professional fees and expenses incurred in connection with any claim, proceeding, or action;

(2) The amount of, and any cost incurred in

connection with, any settlement of any claim, proceeding, or action; and

(3) The amount of, and any cost incurred in connection with, any judgment or penalty imposed with respect to any claim, proceeding, or action.

(j) Nondiscriminatory means that the plan, contract or arrangement in question applies to all employees of an insured depository institution or depository institution holding company who meet reasonable and customary eligibility requirements applicable to all employees, such as minimum length of service requirements. A nondiscriminatory plan, contract or arrangement may provide different benefits based only on objective criteria such as salary, total compensation, length of service, job grade or classification, which are applied on a proportionate basis (with a variance in severance benefits relating to any criterion of plus or minus ten percent) to groups of employees consisting of not less than the lesser of 33 percent of employees or 1,000 employees.

(k) Payment means:

(1) Any direct or indirect transfer of any funds or any asset;

(2) Any forgiveness of any debt or other obligation;

(3) The conferring of any benefit, including but not limited to stock options and stock appreciation rights; and

(4) Any segregation of any funds or assets, the establishment or funding of any trust or the purchase of or arrangement for any letter of credit or other instrument, for the purpose of making, or pursuant to any agreement to make, any payment on or after the date on which such funds or assets are segregated, or at the time of or after such trust is established or letter of credit or other instrument is made available, without regard to whether the obligation to make such payment is contingent on:

(i) The determination, after such date, of the liability for the payment of such amount; or

(ii) The liquidation, after such date, of the amount of such payment.

(l) Prohibited indemnification payment.

(1) The term prohibited indemnification payment means any payment (or any agreement or arrangement to make any payment) by any insured depository institution or an affiliated depository institution holding company for the benefit of any person who is or was an IAP of such insured depository institution or holding company, to pay or reimburse such person for any civil money penalty or judgment resulting from any administrative or civil action instituted by any federal banking agency, or any other liability or legal expense with regard to any administrative proceeding or civil action instituted by any federal banking agency which results in a final order or settlement pursuant to which such person:

(i) Is assessed a civil money penalty;

(ii) Is removed from office or prohibited from participating in the conduct of the affairs of the insured depository institution; or

(iii) Is required to cease and desist from or take any affirmative action described in section 8(b) of the Act with respect to such institution.

(2) Exceptions.

(i) The term prohibited indemnification payment shall not include any reasonable payment by an insured depository institution or depository institution holding company which is used to purchase any commercial insurance policy or fidelity bond, provided that such insurance policy or bond shall not be used to pay or reimburse an IAP for the cost of any judgment or civil money penalty assessed against such person in an administrative proceeding or civil action commenced by any federal banking agency, but may pay any legal or professional expenses incurred in connection with such proceeding or action or the amount of any restitution to the insured depository institution, depository institution holding company or receiver.

(ii) The term prohibited indemnification payment shall not include any reasonable payment by an insured depository institution

or depository institution holding company that represents partial indemnification for legal or professional expenses specifically attributable to particular charges for which there has been a formal and final adjudication or finding in connection with a settlement that the IAP has not violated certain banking laws or regulations or has not engaged in certain unsafe or unsound banking practices or breaches of fiduciary duty, unless the administrative action or civil proceeding has resulted in a final prohibition order against the IAP.

* * *

12 C.F.R. § 359.2

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Titles 1-50 current through March 22, 1996; 61 FR 12014

§ 359.2 Golden parachute payments prohibited.

No insured depository institution or depository institution holding company shall make or agree to make any golden parachute payment, except as provided in this part.

* * *

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12 C.F.R. § 359.3

CODE OF FEDERAL REGULATIONS
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Titles 1-50 current through March 22, 1996; 61 FR 12014

§ 359.3 Prohibited indemnification payments.

No insured depository institution or depository institution holding company shall make or agree to make any prohibited indemnification payment, except as provided in this part.

* * *

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12 C.F.R. § 359.4

CODE OF FEDERAL REGULATIONS
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§ 359.4 Permissible golden parachute payments.

(a) An insured depository institution or depository institution holding company may agree to make or may make a golden parachute payment if and to the extent that:

(1) The appropriate federal banking agency, with the written concurrence of the Corporation, determines that such a payment or agreement is permissible; or

(2) Such an agreement is made in order to hire a person to become an IAP either at a time when the insured depository institution or depository institution holding company satisfies or in an effort to prevent it from imminently satisfying any of the criteria set forth in § 359.1(f)(1)(ii), and the institution's appropriate federal banking agency and the Corporation consent in writing to the amount and terms of the golden parachute payment. Such consent by the FDIC and the institution's appropriate federal banking agency shall not improve the IAP's position in the event of the

insolvency of the institution since such consent can neither bind a receiver nor affect the provability of receivership claims. In the event that the institution is placed into receivership or conservatorship, the FDIC and/or the institution's appropriate federal banking agency shall not be obligated to pay the promised golden parachute and the IAP shall not be accorded preferential treatment on the basis of such prior approval; or

(3) Such a payment is made pursuant to an agreement which provides for a reasonable severance payment, not to exceed twelve months salary, to an IAP in the event of a change in control of the insured depository institution; provided, however, that an insured depository institution or depository institution holding company shall obtain the consent of the appropriate federal banking agency prior to making such a payment and this paragraph (a)(3) shall not apply to any change in control of an insured depository institution which results from an assisted transaction as described in section 13 of the Act (12 U.S.C. 1823) or the insured depository institution being placed into conservatorship or receivership; and

(4) An insured depository institution, depository institution holding company or IAP making a request pursuant to paragraphs (a)(1) through (3) of this section shall demonstrate that it does not possess and is not aware of any information, evidence, documents or other materials which would indicate that there is a reasonable basis to believe, at the time such payment is proposed to be made, that:

(i) The IAP has committed any fraudulent act or omission, breach of trust or fiduciary duty, or insider abuse with regard to the depository institution or depository institution holding company that has had or is likely to have a material adverse effect on the institution or holding company;

(ii) The IAP is substantially responsible for the insolvency of, the appointment of a conservator or receiver for, or the troubled condition, as defined by applicable regulations of the appropriate federal banking agency, of the insured depository institution, depository institution holding company or any insured depository institution subsidiary of such holding company;

(iii) The IAP has materially violated any applicable federal or state banking law or regulation that has had or is likely to have a material effect on the insured depository institution or depository institution holding company; and

(iv) The IAP has violated or conspired to violate section 215, 656, 657, 1005, 1006, 1007, 1014, 1032, or 1344 of title 18 of the United States Code, or section 1341 or 1343 of such title affecting a federally insured financial institution as defined in title 18 of the United States Code.

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(b) In making a determination under paragraphs (a)(1) through (3) of this section, the appropriate federal banking agency and the Corporation may consider:

(1) Whether, and to what degree, the IAP was in a position of managerial or fiduciary responsibility;

(2) The length of time the IAP was affiliated with the insured depository institution or depository institution holding company, and the degree to which the proposed payment represents a reasonable payment for services rendered over the period of employment; and

(3) Any other factors or circumstances which would indicate that the proposed payment would be contrary to the intent of section 18(k) of the Act or this part.

* * *

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12 C.F.R. § 359.7

CODE OF FEDERAL REGULATIONS
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§ 359.7 Applicability in the event of receivership.

The provisions of this part, or any consent or approval granted under the provisions of this part by the FDIC (in its corporate capacity), shall not in any way bind any receiver of a failed insured depository institution. Any consent or approval granted under the provisions of this part by the FDIC or any other federal banking agency shall not in any way obligate such agency or receiver to pay any claim or obligation pursuant to any golden parachute, severance, indemnification or other agreement. Claims for employee welfare benefits or other benefits which are contingent, even if otherwise vested, when the FDIC is appointed as receiver for any depository institution, including any contingency for termination of employment, are not provable claims or actual, direct compensatory damage claims against such receiver. Nothing in this part may be construed to permit the payment of salary or any liability or legal expense of any IAP contrary to 12 U.S.C. 1828(k)(3).

* * *

(2)

Supreme Court, U.S.
FILED
DEC 4 1997
CLERK

No. 97-607

In the Supreme Court of the United States

OCTOBER TERM, 1997

JOHN R. MCCARRON, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF MERITOR SAVINGS BANK AND IN ITS OWN CAPACITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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1688

QUESTIONS PRESENTED

1. Whether benefits payable to a former executive of a failed insured depository institution under a severance agreement are "actual direct compensatory damages" for which the Federal Deposit Insurance Corporation (FDIC), as receiver, is liable under 12 U.S.C. 1821(e)(3), even though the FDIC has lawfully repudiated the agreement.

2. Whether the court of appeals erred in ruling that petitioner had not met the requirements to qualify for an exception to a proposed FDIC regulation that would have prohibited his severance agreement.

3. Whether the court of appeals erred in deciding that the FDIC had not abused its discretion, as receiver, to repudiate petitioner's severance agreement because the receivership had surplus funds four years after the repudiation.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-607

JOHN R. MCCARRON, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF MERITOR SAVINGS BANK AND IN ITS OWN CAPACITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 111 F.3d 1089. The opinion of the district court (Pet. App. 20a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1997. A petition for rehearing was denied on July 8, 1997. Pet. App. 35a-36a. The petition for a writ of certiorari was filed on October 6, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Deposit Insurance Corporation (FDIC), as receiver for a failed insured depository institution, is authorized to repudiate any contract to which the institution is a party the performance of which the FDIC, in its discretion, determines will be burdensome and the repudiation of which the FDIC, in its discretion, determines will promote the orderly administration of the institution's affairs. 12 U.S.C. 1821(e)(1). The liability of the FDIC for any repudiation is "limited to actual direct compensatory damages." 12 U.S.C. 1821(e)(3)(A). "[D]amages for lost profits or opportunity" are expressly excluded. 12 U.S.C. 1821(e)(3)(B)(ii). A claimant whose claim has been disallowed by the FDIC may file suit either in the district court for the district within which the depository institution's principal place of business is located or in the United States District Court for the District of Columbia. 12 U.S.C. 1821(d)(6)(A).

2. On December 11, 1992, the Secretary of Banking for the Commonwealth of Pennsylvania declared Meritor Savings Bank (Meritor) insolvent and appointed the FDIC receiver. Pet. App. 3a. In its capacity as receiver, the FDIC executed a Purchase and Assumption Agreement transferring a portion of Meritor's assets and liabilities to Mellon Bank (Mellon). *Ibid.* The FDIC retained the liabilities not assumed by Mellon and the assets not purchased by Mellon, which the FDIC proceeded to liquidate for the benefit of Meritor's approved creditors. *Ibid.*

Prior to its insolvency, in 1988, Meritor had hired petitioner as its Executive Vice President and General Counsel. Pet. App. 2a. Meritor had agreed to pay petitioner severance benefits under either of two

mutually exclusive agreements. *Ibid.* A Severance Compensation Agreement (SCA) provided that petitioner would receive a lump sum equal to twice his annual salary, as well as the continuation of certain insurance benefits for 24 months, if Meritor discharged him without cause. *Id.* at 2a-3a. Under a separate Agreement for Compensation on Discharge Subsequent to a Change in Control (CIC), if Meritor discharged him without cause in a "change in control," the bank agreed to pay petitioner three times his annual salary and to extend insurance benefits for 36 months. *Id.* at 2a. Petitioner was also covered under Meritor's Separation Pay Plan (SPP), an employee benefit plan that covered all Meritor employees and provided severance pay under certain circumstances based upon years of service with the bank. *Id.* at 3a. Meritor also provided petitioner with benefits under its Supplementary Unfunded Retirement Plan (SURP), a non-qualified pension plan for highly paid executives designed to supplement the retirement payments available to them under Meritor's qualified plan. *Ibid.* On the day that the Secretary of Banking closed Meritor, the FDIC informed petitioner and other Meritor employees that the FDIC would not make severance payments to the employees. *Ibid.*

3. In March 1994, petitioner filed suit in federal district court, seeking severance and retirement benefits. Pet. App. 4a-5a. On January 26, 1996, the district court entered judgment for the FDIC based upon the Third Circuit's decision in *Hennessy* v. *FDIC*, 58 F.3d 908 (1995), cert. dismissed, 116 S. Ct. 688 (1995), cert. denied, 116 S. Ct. 1318 (1996), in which the court of appeals held that the FDIC had lawfully repudiated Meritor's severance obligations under the SPP to both its executives and its other employees.

Pet. App. 20a-26a. The *Hennessy* court held, further, that the former employees were not entitled to severance benefits as "actual direct compensatory damages" arising from the repudiation. See 58 F.3d at 918-921. The district court determined that *Hennessy* controlled petitioner's severance claims under his individual severance agreements as well as under the SPP. Pet. App. 22a-24a. The district court also held that petitioner was not entitled to retirement benefits under the SURP because his benefits had not vested at the time of the FDIC receivership. *Id.* at 24a-25a.

4. The court of appeals affirmed the district court's judgment on petitioner's severance claims but remanded for further consideration of petitioner's claim for retirement benefits under the SURP. Pet. App. 1a-19a. The court of appeals held that petitioner had no claim for benefits under the CIC because "the triggering events contemplated by it never occurred." *Id.* at 11a-12a. The court of appeals characterized petitioner's SCA as a standard severance agreement, "virtually indistinguishable" from the SPP at issue in *Hennessy*, and held that the FDIC's repudiation of Meritor's severance obligations also encompassed that agreement. *Id.* at 8a-10a. Applying its holding in *Hennessy* that claims for severance benefits are analogous to liquidated damages and are not "actual direct compensatory damages" for which Section 1821(e)(3) allows recovery, the court found that the FDIC was not liable for repudiation damages. *Id.* at 10a-11a.

The court of appeals also rejected petitioner's argument that he was nonetheless entitled to benefits under an FDIC regulation promulgated in 1996, six years after petitioner entered into his severance

agreements with Meritor. The regulation, 12 C.F.R. Pt. 359, bans certain employee-specific severance agreements called "golden parachutes" but provides an exception to permit troubled institutions to enter into those agreements with individuals, known as "white knights," who are hired to help restore an institution to profitability. The court determined that the regulation could not support petitioner's severance claim, even assuming petitioner was a white knight, because the exception to the ban on golden parachutes is not applicable unless the institution's "appropriate federal banking agency and the FDIC 'consent in writing to the amount and terms of the golden parachute payment.'" Pet. App. 14a (quoting 12 C.F.R. 359.4). The court thus concluded that there was "no factual or legal basis to permit payment of [petitioner's] severance claims under the FDIC rules governing the white knight exception." *Ibid.* The court of appeals noted, further, that the FDIC regulation specifically provides that the receiver for a failed bank would not be obligated to pay the promised golden parachute, even if the payment was pre-approved. *Id.* at 14a-15a. Finally, the court of appeals rejected petitioner's challenge to the lawfulness of the FDIC's repudiation based on the current solvency of the Meritor receivership. The court explained that petitioner had not presented any facts indicating why and how the receivership became solvent and refused to "us[e] 20/20 hindsight" to evaluate the FDIC's initial determination that honoring the severance agreements would have been burdensome. *Id.* at 19a n.4.

ARGUMENT

The Third Circuit correctly held that the FDIC is not liable to petitioner for severance payments as damages for its lawful repudiation of the severance agreement between petitioner and Meritor. Although other courts of appeals have allowed former bank employees to recover severance benefits from the FDIC, the narrow issue of the FDIC's liability for severance benefits as repudiation damages does not present a conflict that is likely to have broad future impact. The other issues pressed by petitioner are fact-bound and do not implicate any important question of federal law. Accordingly, further review by this Court is not warranted.

1. a. The court of appeals correctly interpreted 12 U.S.C. 1821(e) to permit the FDIC to repudiate a severance agreement without becoming liable for the severance payments that it has repudiated as "actual direct compensatory damages" for the repudiation. Congress intended through Section 1821(e)(3) "to pare back damage claims founded on repudiated contracts." See *Howell* v. *FDIC*, 986 F.2d 569, 572 (1st Cir. 1993). Congress therefore expressly provided that the FDIC would not be liable for the full range of damages for which a party who repudiates a contract would ordinarily be liable. *Id.* at 573. Thus, Congress limited liability to "actual direct compensatory damages" and expressly excluded from that term "damages for lost profits and opportunity," as well "punitive or exemplary damages" and "damages for pain and suffering." See 12 U.S.C. 1821(e)(3).

Severance payments are an estimate, made at the time of employment, of potential losses as a result of the termination of employment. They thus fall

squarely within the "damages for lost * * * opportunity" for which Congress explicitly barred FDIC liability. Moreover, because they are stipulated in advance, severance payments are unlikely, except by happenstance, to compensate for "actual direct" losses suffered by a terminated employee. Indeed, in petitioner's case, the severance payments under the SCA would have been twice his annual salary and would have been in addition to payments made to petitioner as an ordinary employee under the SPP. As the First and Third Circuits have recognized, severance payments are designed to be an easily determined proxy for possible loss from foregone alternative employment and to avoid problems of proof and disputes over an employee's ability to mitigate damages by finding new employment. See *Howell*, 986 F.2d at 573; *Hennessy* v. *FDIC*, 58 F.3d 908, 921 (3d Cir. 1995), cert. dismissed, 116 S. Ct. 688 (1995), cert. denied, 116 S. Ct. 1318 (1996). Severance payments are therefore more akin to "liquidated damages" than they are to the "actual direct compensatory damages" permitted by the statute. See *Howell*, 986 F.2d at 573 (citing E. Allan Farnsworth, *Contracts* § 12.18 (2d ed. 1990), and Charles McCormick, *Damages* § 146 (1935)). See also *Hennessy*, 58 F.3d at 921.

The specific rules governing the availability of damages for repudiation of leases in Section 1821(e)(4) confirm a reading of the general provisions that bars compensation for estimates of lost employment opportunity. If the FDIC repudiates a lease, it is liable for rent until the time of the repudiation but not for future rent. See 12 U.S.C. 1821(e)(4)(B). "As with severance pay, the lessor may have foregone other opportunities but the loss is not to be recompensed." *Howell*, 986 F.2d at 573.

The plain language of Section 1821(e)(3) and of related statutory provisions thus confirms the conclusion of the court of appeals. Indeed, the contrary conclusion would give the damage provision of Section 1821(e)(3) the practical effect of denying the FDIC the right to repudiate severance agreements that is clearly granted by Section 1821(e)(1). Under that reading of the statute, the FDIC would always owe damages equal to the payments that it would have owed if it had instead affirmed the agreements.

b. Petitioner argues, however, that this Court should grant certiorari to resolve a conflict among the courts of appeals, which are divided on the issue whether the FDIC is liable for damages when it lawfully repudiates a severance agreement. The Third Circuit, in this case and in *Hennessy*, *supra*, as well as the First Circuit in *Howell*, *supra*, have held that severance payments do not constitute "actual direct" damages because the payment amounts are estimates of potential damages from lost employment opportunity, akin to liquidated damages. The District of Columbia, Ninth, and Eleventh Circuits have disagreed and have held that severance payments are "actual direct compensatory damages" within the meaning of Section 1821(e)(3). See *Office & Professional Employees Int'l Union, Local 2* v. *FDIC*, 27 F.3d 598 (D.C. Cir. 1994) (*OPEIU*); *Monrad* v. *FDIC*, 62 F.3d 1169 (9th Cir. 1995); *McMillian* v. *FDIC*, 81 F.3d 1041 (11th Cir. 1996). The disagreement among those courts of appeals is unlikely to be of broad future significance, however, and therefore does not require resolution by this Court at this time.

There are no longer any cases pending in the lower courts involving the question whether a receiver's

repudiation of a severance agreement gives rise to damages, and there are not likely to be a significant number of such cases in the future. In 1993, after the dispute in this case arose, Congress enacted a national depositor-preference statute, 12 U.S.C. 1821(d)(11), which requires that all insured and uninsured depositors be paid in full before any general creditor. Under the new preference rules, severance claims would arise only in those relatively few instances in which a receivership has assets remaining after all of the depositors' claims have been fully satisfied. In addition, there has been a dramatic reduction in the number of bank failures in recent years, in part as a result of a healthy economy, but also due to improvements in bank and thrift regulation implemented by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, and the Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, 105 Stat. 2236.*

If a dispute over the FDIC's liability for severance benefits should arise, it is likely that plaintiffs in the First and Third Circuits will take advantage of the choice of venue provided them by 12 U.S.C. 1821(d)(6)(A) to bring themselves under the rule of the District of Columbia Circuit in *OPIEU*. All plaintiffs

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* In 1996, the FDIC closed only six insured depository institutions. FDIC, *Annual Report—1996*, at 24, 25, 111. To date in 1997, there have been no bank failures. *The Condition of the Banking and Thrift Industries: Hearings Before the Subcomm. on Financial Institutions and Regulatory Relief of the Senate Comm. on Banking, Housing, and Urban Affairs*, 105th Cong., 1st Sess. 3 (Oct. 21, 1997) (testimony of Andrew C. Hove, Jr., Acting Chairman, FDIC); FDIC, *FDIC Quarterly Banking Profile* 3 (Second Quarter 1997).

thus have the ability as well as the incentive to pursue their claims in fora that adhere to the same reading of the statute. In any event, this Court would have the opportunity to revisit the meaning of Section 1821(e)(3) if a new dispute arose. Thus, resolving the disagreement among the courts of appeals would not be a worthwhile use of this Court's resources at this time.

2. Petitioner also argues (Pet. 7-10) that the Court should grant certiorari because the court of appeals rejected his claim that his severance agreements should have been honored under the white knight exception to the golden parachute regulation. The fact-bound claim that the court of appeals misapplied the regulation to the circumstances of petitioner's case does not warrant review. The court of appeals correctly concluded that petitioner is not covered by the exception. Petitioner does not dispute that the FDIC did not "consent in writing to the amount and terms" of his severance agreement and that written consent is an explicit condition precedent to the application of the exception. See 12 C.F.R. 359.4. In any event, the regulation is irrelevant to petitioner's case. The FDIC did not rest its denial of petitioner's severance claim on the regulation. Indeed, as petitioner admits, the regulation was not even in effect when petitioner and Meritor entered into the severance agreements. The court of appeals discussed the regulation in its opinion only because petitioner sought to avail himself of the exception.

Petitioner's contention (Pet. 7-10) that the decision of the court of appeals regarding the regulation conflicts with the holding in *United States* v. *Winstar Corp.*, 116 S. Ct. 2432 (1996), has no basis. In *Winstar*, this Court held the United States liable for breach of

contract when it declined to honor agreements permitting the use of certain accounting methods that were prohibited by a subsequent change in law. Petitioner maintains (Pet. 9) that the court of appeals contravened the holding in *Winstar* by allowing the FDIC "to revoke its prior approval of the [severance] agreement" based on a new regulation, without incurring any liability for damages. Contrary to petitioner's contention, the court of appeals did not hold that the FDIC revoked any prior approval of the terms and conditions of petitioner's agreement. Nor did the FDIC or the court of appeals rely on the new regulation as the basis for the denial of petitioner's severance benefits. As described above, the court of appeals ruled that petitioner could not avail himself of the exception to the regulation because the FDIC had never consented in writing to the terms of his severance agreement. Pet. App. 14a. The court's further observation that, even if petitioner had obtained prior written approval, the FDIC could have validly repudiated the contract is merely dictum that was unnecessary to its resolution of petitioner's claim. Thus, petitioner's argument lacks merit.

3. Finally, petitioner suggests (Pet. 11) that this Court should grant certiorari to review his assertion that he is "a general creditor who should be paid by the receiver before distribution to subordinated creditors and to shareholders." The court of appeals addressed that claim in a footnote, observing that the factual basis for petitioner's contention, raised in a letter submitted pursuant to Federal Rule of Appellate Procedure 28(j), merely established a surplus in the receivership as of October 1996. Pet. App. 19a n.4. Noting that petitioner had presented no facts "indicat[ing] when and how [the receivership] became

solvent," the court declined to "us[e] 20/20 hindsight" to evaluate the FDIC's determination in 1992 that affirmation of petitioner's severance agreement would have been burdensome. *Ibid.* The court of appeals' determination that petitioner did not present facts sufficient to support his claim that a surplus in the receivership in 1996 showed that the FDIC abused its discretion when it repudiated his severance agreement in 1992 presents no issue warranting review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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